

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

APPEAL FROM DISTRICT COURT

No. 110

WHITE OAK TRANSPORTATION COMPANY, PETITIONER,

BOSTON, GALE AND NEW YORK CANAL COMPANY

VERSUS

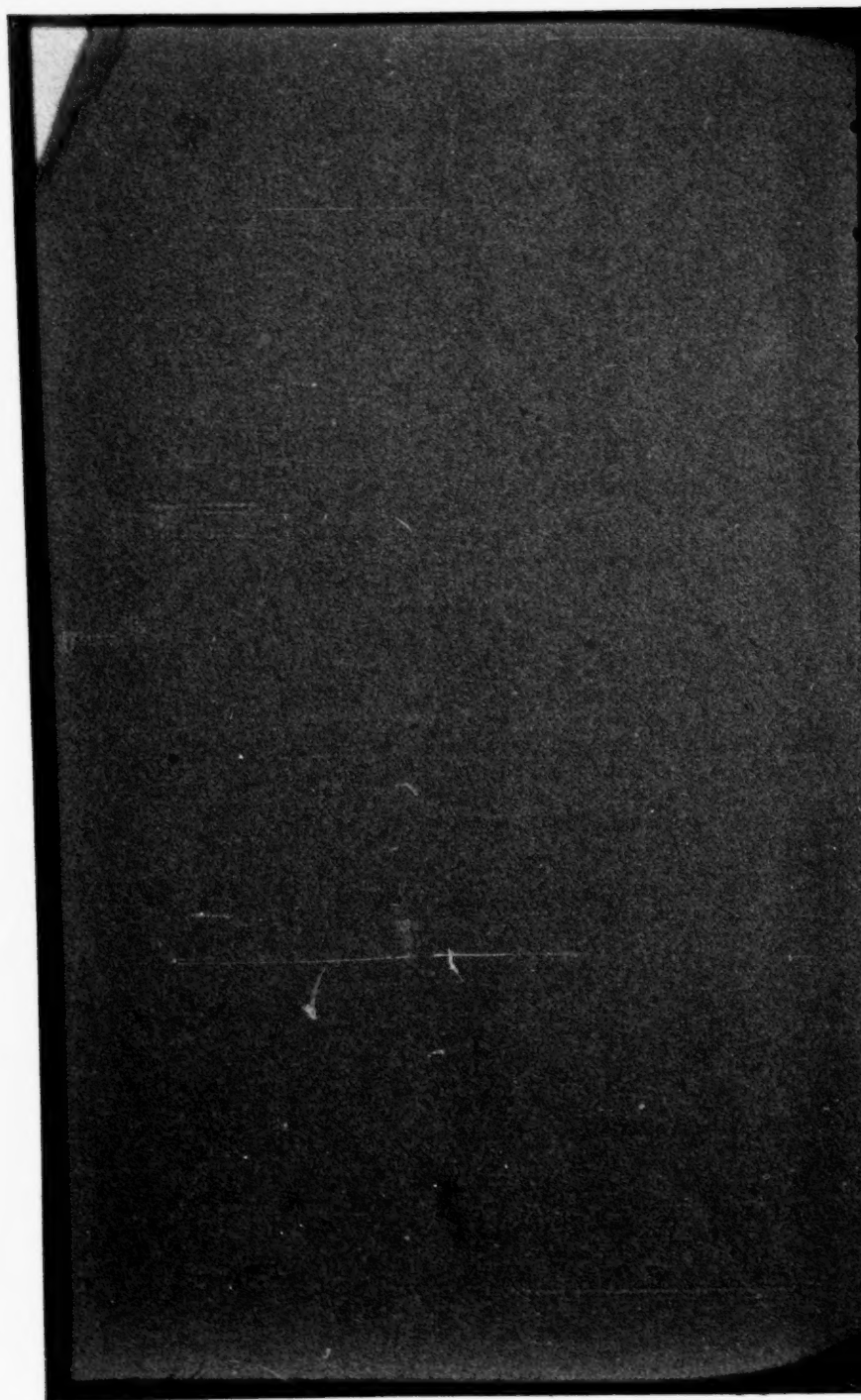
No. 184

NORTHERN CANAL COMPANY, PETITIONER,

BOSTON, GALE AND NEW YORK CANAL COMPANY

VERSUS

ON WRIT OF HABEAS CORPUS



(27,824)

(27,844)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 467.

WHITE OAK TRANSPORTATION COMPANY, PETITIONER,
vs.
BOSTON, CAPE COD AND NEW YORK CANAL COMPANY.

PETITION FOR CERTIORARI FILED AUGUST 4, 1920.

No. 487.

NORTHERN COAL COMPANY, PETITIONER,
vs.
BOSTON, CAPE COD AND NEW YORK CANAL COMPANY.

PETITION FOR CERTIORARI FILED AUGUST 14, 1920.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE FIRST CIRCUIT.

INDEX.

	Original.	Print.
Caption	a	1
No. 1397.		
Court (circuit court of appeals) and title of case.....	1	2
Transcript of record of district court.....	1	2
Title of case in district court.....	1	2
Libel	1	3
Libellant's interrogatories.....	6	6
Stipulation to the action.....	9	9

Answer	10	10
Answers to libellant's interrogatories.....	16	14
Respondent's interrogatories.....	20	17
Libellant's answers to respondent's interrogatories.....	21	18
Hearing	22	18
Final decree.....	22	18
Claim of appeal and allowance thereof.....	23	19
Memorandum of decision.....	23	19
Motion to extend time for claiming appeal (allowed)....	34	27
Petition for appeal.....	34	28
Assignment of errors.....	34	28
Bond on appeal.....	37	30
Citation and acknowledgment of service thereof.....	38	31
Certificate of clerk of district court.....	38	31

No. 1308.

Court (circuit court of appeals) and title of case.....	41	32
Transcript of record of district court.....	41	32
Title of case in district court.....	41	32
Libel	41	33
Libellant's interrogatories.....	47	37
Answer of Boston Insurance Co., garnishee.....	56	44
Globe & Rutgers Fire Insurance Co., garnishee.....	57	44
National Fire Insurance Co., garnishee.....	57	45
Glen Falls Insurance Co., garnishee.....	58	45
White Oak Transportation Co., etc.....	59	46
Answers to libellant's interrogatories.....	66	52
Respondent's interrogatories.....	73	57
Exceptions of respondent to certain interrogatories.....	83	64
Motion that libellant be ordered to answer interrogatories.....	84	65
Exceptions of libellant to certain interrogatories.....	84	65
Motion to amend answer.....	87	67
Hearing	89	68
Libellant's answers to interrogatories.....	89	68
Stipulation as to hearing on limitation of liability.....	98	74
Final decree.....	98	75
Memorandum of decision.....	99	76
Memorandum <i>in re</i> interrogatories.....	99	76
Petition for appeal.....	100	77
Assignment of errors.....	101	77
Bond on appeal.....	103	79
Citation and acknowledgment of service thereof.....	105	80
Certificate of clerk of district court.....	105	81

No. 1309.

Court (circuit court of appeals) and title of case.....	107	81
Transcript of record of district court.....	107	81

	Original.	Print.
Title of case in district court.....	107	81
Libel	107	82
Answer as amended.....	113	86
Respondent's motion for leave to file petition under Rule 59	119	91
Petition to bring in The T. A. Scott Co., Inc. (allowed)....	120	92
Petition of Northern Coal Co. to intervene.....	122	94
Answer to intervening petition of Northern Coal Co.....	125	96
Stipulation for costs.....	130	99
Answer of T. A. Scott Co., Inc., to libel.....	131	100
Answer of T. A. Scott Co., Inc., to petition of Canal Com- pany and interrogatories by T. A. Scott Co., etc.....	136	104
Respondent's interrogatories to petitioner.....	141	108
Answers to interrogatories by T. A. Scott Co., Inc.....	142	109
Hearing	147	113
Final decree.....	147	113
Claim of appeal and allowance thereof.....	148	114
Memorandum of decision.....	149	114
Order <i>nunc pro tunc</i> relative to time for filing answer....	149	115
Libellant's and intervening petitioner's petition for appeal.	149	115
Assignment of errors.....	150	115
Bond on appeal.....	152	118
Petition as to testimony to be filed in court of appeals....	154	119
Agreement as to exhibits.....	155	120
Citation and acknowledgment of service thereof.....	156	121
Certificate of clerk of district court.....	157	121
Orders of enlargement of time for docketing case, etc....	157	122
Evidence for White Oak Transportation Co.....	159	124
Testimony of Howard F. Fanning.....	159	125
Evidence for T. A. Scott Company, Inc.....	173	136
Deposition of Wm. Murray McDonald.....	174	137
Evidence for Boston, Cape Cod and N. Y. Canal Co.....	179	142
Opening statement of Mr. Pillsbury.....	179	142
Testimony of Wm. Wilson.....	183	145
Wm. T. Lewis.....	199	159
Thomas Lecompte.....	233	188
Evidence for The T. A. Scott Company, Inc.....	255	206
Testimony of Robert Sherman Gardner.....	255	206
Evidence for Boston, Cape Cod and N. Y. Canal Co.....	258	209
Testimony of W. H. Myers.....	258	209
Michael J. Donnelly.....	264	214
Daniel H. McGilvray.....	275	224
Augustus F. Wagner.....	278	226
Abe Smith.....	284	232
Wm. S. Crocker.....	287	235
Canal Company Exhibit 2—Plan showing sound- ings, etc.....	298a	244
Bay Port Exhibit 1—Sketch showing soundings..	298b	244
2—Sketch showing boulders on slopes, etc.....	298c	244

INDEX.

	Original.	Print.
Bay Port Exhibit 3—Sketch showing soundings, etc.	300a	247
4—Sketch showing soundings on shoal, etc.....	303a	249
5—Plan	304a	251
6—Sketch showing soundings, etc.	304b	251
7—Sketch showing boulders on slopes, etc.....	305a	252
Testimony of George G. Rochester.....	309	256
Testimony of Henry Dunbar.....	321	267
Canal Company Exhibit 3—Float observations....	324a	270
Canal Company Exhibit 4—Sketch showing sound- ings, etc.....	329a	275
Testimony of S. A. Kidston.....	333	278
Testimony of John J. Coakley.....	337	282
Evidence for The T. A. Scott Co., Inc.....	362	303
Testimony of Thomas A. Scott.....	362	303
Joseph I. Kemp.....	381	319
Edward R. Geer.....	397	332
Evidence for the White Oak Transportation Co.....	423	355
Testimony of J. N. Maker.....	423	355
Evidence for The T. A. Scott Co., Inc.....	428	360
Testimony of Arthur J. Daly.....	428	360
Wm. A. P. Brunn.....	435	365
A. J. Davis.....	438	369
Israel Merritt Tooker.....	448	377
Lyman J. Robbins.....	457	384
Benjamin Kemp.....	460	387
Michael J. Brennan.....	467	393
Eugene Fullerton.....	475	400
A. J. Daly (recalled).....	475	401
Henry M. Pendleton.....	477	402
Evidence for the White Oak Transportation Co.....	481	405
Opening statement of Edward E. Blodgett.....	481	405
Testimony of Joseph Tillotson Drake.....	483	407
Fred N. Hart.....	486	410
Perry F. Dunton.....	497	420
Hiram W. Hammett.....	502	424
Louis H. Tilmans.....	539	456
Alexander M. Shelton.....	542	458
Leroy Maker.....	570	483
Sydney A. Reeve.....	583	495
Exhibit Bay Port 16—Blue-print.....	588a	499
Evidence for Boston, Cape Cod and New York Canal Co...	608	515
Testimony of Foye N. Murphy.....	608	515
Wm. T. Lewis (recalled).....	610	517
Edward R. Geer (recalled).....	616	522
Wm. S. Crocker (recalled).....	621	527
Arthur J. Daly (recalled).....	626	531
Clinton D. Davis.....	627	531

INDEX.

v

	Original.	Print.
Testimony of August Belmont.....	633	538
Evidence for the T. A. Scott Co., Inc.....	638	542
Testimony of Edward R. Geer (recalled).....	638	542
Evidence for the Boston, Cape Cod and New York Canal Co.	641	544
Testimony of Charles Maass.....	641	544
Clerk's certificate.....	645	547
Opinion by Johnson, J.....	647	548
Motion of Northern Coal Co. to amend decree.....	659	557
Final decrees.....	663	559
Order staying mandate.....	664	561
Motion to stay mandate.....	665	561
Order to stay mandate.....	665	562
Motion to stay mandate.....	666	562
Order to stay mandate.....	666	563
Clerk's certificate.....	667	564
Writ of certiorari and return in case of White Oak Trans- portation Co. <i>vs.</i> Boston, Cape Cod and New York Canal Co.	668	564
Writ of certiorari and return in case of Northern Coal Com- pany <i>vs.</i> Boston, Cape Cod and New York Canal Co.....	674	567
Stipulation to consolidate for hearing on one record.....	680	571
 Certified copy of opinion of circuit court of appeals on motion to amend decree.....		 572

a

Original.

Volume I.

United States Circuit Court of Appeals for the First Circuit, October Term, 1919.

No. 1397.

BOSTON, CAPE COD & NEW YORK CANAL CO., Libellant, Appellant,

v.

THE T. A. SCOTT COMPANY, INC., Respondent, Appellee.

No. 1398.

SAME

v.

WHITE OAK TRANSPORTATION COMPANY.

No. 1399.

WHITE OAK TRANSPORTATION COMPANY et al., Appellants,

v.

BOSTON, CAPE COD & NEW YORK CANAL CO. et al., Appellees.

Appeals from the District Court of the United States for the District of Massachusetts from Final Decrees (Morton, J.), September 4, 1918.

Volume I.

Pleadings.

Certified Copy (in Two Volumes) of Record and All Proceedings in Said Causes to and Including July 29, 1920.

b

Volume I.

United States Circuit Court of Appeals for the First Circuit, October Term, 1918.

No. 1397.

BOSTON, CAPE COD & NEW YORK CANAL CO., Libellant. Appellant,

v.

THE T. A. SCOTT COMPANY, INC., Respondent, Appellee.

No. 1398.

SAME

v.

WHITE OAK TRANSPORTATION COMPANY.

No. 1399.

WHITE OAK TRANSPORTATION COMPANY et al., Appellants,

v.

BOSTON, CAPE COD & NEW YORK CANAL CO. et al., Appellees.

Appeals from the District Court of the United States for the District of Massachusetts from Final Decrees (Morton, J.), September 4, 1918.

Volume I.

Pleadings.

Samuel H. Pillsbury, Currier, Young & Pillsbury, for Boston, Cape Cod & New York Canal Co.

Samuel Park, Park & Mattison, for The T. A. Scott Company.

Edward E. Blodgett, Foye M. Murphy, Blodgett, Jones, Burnham & Bingham, for White Oak Transportation Co.

Henry E. Warner, Warner, Stackpole & Bradlee, for Northern Coal Co.

1 United States Circuit Court of Appeals for the First Circuit,
October Term, 1918.

No. 1397.

BOSTON, CAPE COD & NEW YORK CANAL COMPANY, Libellant,
Appellant,

v.

THE T. A. SCOTT COMPANY INC., Respondent, Appellee.

TRANSCRIPT OF RECORD OF DISTRICT COURT.

In Admiralty.

No. 1517.

BOSTON, CAPE COD & NEW YORK CANAL COMPANY, Libellant,

v.

THE T. A. SCOTT COMPANY, INC., Respondent.

The libel in this cause was filed in the clerk's office on the tenth day of January, A. D. 1917, and was duly entered at the December Term of this court, A. D. 1916, and is as follows:

Libel.

[Filed January 10, 1917.]

To the Honorable James Madison Morton, Jr., Judge of the District Court of the United States within and for the District of Massachusetts:

The libel of the Boston, Cape Cod and New York Canal Company, incorporated under the laws of the Commonwealth of Massachusetts, against The T. A. Scott Company, Inc., incorporated under
2 the laws of the State of Connecticut, in a cause of damage, civil and maritime. And thereupon the libellant alleges as follows:

1. The libellant was at the time hereinafter mentioned and is a corporation organized under the laws of Massachusetts and pursuant to such laws had constructed, and was maintaining and managing and using, a navigable tide-water ship canal for the passage of vessels and water craft of all kinds for tolls between Buzzard's Bay and Cape Cod Bay in the said District of Massachusetts.

2. The T. A. Scott Company, Inc., the defendant, at the times herein referred to was a corporation duly organized under the laws of the State of Connecticut and having a usual place of business in Springfield in the District of Massachusetts, the business of which comprised the repairing of damaged vessels and the care and removal of wrecked crafts.

3. On December 13, 1916, in the early afternoon, the steamer "Bay Port" owned and operated by the White Oak Transportation Company, a corporation organized under the laws of the State of Maine, while attempting to pass eastward through the Cape Cod Canal with a cargo of about 2,393 tons of coal struck on the south bank at a point a short distance west of Bournedale. As a result one small hole was stove in her starboard side forward of midships and the Bay Port was resting with her bilge on the south bank.

4. In these circumstances in the early evening of December 13, 1916, the defendant through its agent, Captain Joseph Lewis, at the request of the owners, took charge of the Bay Port with the

object of floating and removing her from the canal. The tugs Dalzelline, Hazelton and John C. Stuart of the Cape Towing Corporation, a corporation organized under the laws of the State of Delaware, which were present in the canal near the Bay Port to render whatever assistance they could, became subject to the orders of the said agent of the defendant.

5. Early on the following morning, December 14, 1916, the Bay Port was examined by a diver under the orders of Captain Joseph Lewis acting on behalf of the defendants, and the hole in its starboard side plugged up, and the leak checked.

6. Later on the same morning while the Bay Port was still in the charge of Captain Joseph Lewis on behalf of the defendant, the said steamer moved off the bank, to which by reason of the negligence of the defendant and its servants she had not been made fast. At that time the tugs Dalzelline, John C. Stuart and Hazelton were still by the Bay Port subject to Captain Joseph Lewis's orders, but owing to the negligence of the defendant and its servants the bows of the said tugs were turned toward the west and their engines not running. Captain Joseph Lewis at that time was on the lighter Salvor of the defendant, which by his orders had been brought alongside the Bay Port, and was engaged in superintending the rigging of coal buckets by the defendant's agents on the Salvor to remove the Bay Port's cargo. Owing to the failure of the defendant through its agents and servants to take proper precautions to hold the Bay Port by the bank or to make suitable preparations to conduct the Bay Port through the canal, the said steamer began to float eastward with the tide. In the emergency William Lewis of the Cape Pilot Association, a pilot licensed by the United States Government, stepped from the Hazelton on board the Bay Port. Under Pilot William Lewis's orders the captain of the Bay Port started his engines and with a hard-a-port wheel straightened out the Bay Port, which was drifting broadside and toward the north bank. The Dalzelline very quickly got a hawser on her bow, and after she had moved about half a mile the Hazelton caught up with her just as she sheered to port. Proper orders were given to check the sheer, but the Bay Port struck on the north bank. Her stern swung to the south bank and her bow away from the north bank, and she then sank diagonally across the canal with her stern on the south bank.

7. By the striking of the said Bay Port against the banks of the canal and by her sinking as aforesaid the canal has sustained severe damage.

8. In her sunken location the Bay Port obstructed one half of the canal channel and constituted such a serious blockade of the canal as to close the same to navigation, and thenceforth continued and still continues to obstruct the said canal and close it to navigation.

4 9. The libellant gave the defendant repeated notices to remove the wreck, but defendant has failed to do so, and the Bay Port still remains an obstruction to traffic in the said canal.

10. As a result of the defendant's failure to remove the wreck from the canal channel the libellant has been obliged to contract on its own credit for the removal of the Bay Port.

11. Owing to the obstruction a large number of ships of all kinds have been prevented from using the said canal and will continue to be so prevented so long as the obstruction continues, whereby the libellant has lost and will continue to lose a large amount of tolls and charges.

12. Owing to the negligence of the defendant as aforesaid in causing physical damage to the libellant's canal by disturbing the rip-rap on the banks, in obstructing the navigation of the said canal, and in putting the libellant to the expense of removing the wreck and restoring the said canal to its normal condition for the passage of traffic, the libellant has sustained heavy loss and been put to great expense and will be put to greater expense and will sustain heavy loss, all to the damage of the libellant in the estimated sum of \$60,000.

13. The Bay Port's sliding off the bank, striking against the banks, and sinking and blocking the canal on December 14, were in no way caused by the fault of the libellant, but were wholly and entirely caused by the negligence of the defendant and its agents.

a. In that the defendant through its agents assumed charge of the Bay Port and negligently cared for the said steamer while she was resting on the bank subsequent to the accident of December 13, and negligently suffered the said steamer to slide off the bank at a time when the defendant was at fault in not being prepared to complete the navigation of the canal by the Bay Port, as a result of which she sank in the channel;

b. In that the defendant after assuming charge of the Bay Port subsequent to the accident of December 13, negligently permitted the Bay Port to become afloat in the said canal in an unsafe condition for navigation and negligently failed to be prepared to complete the passage through the canal by the Bay Port, as a result of which she sank in the channel;

5 *c.* In that the defendant although repeatedly requested to do so by libellant did not remove the said steamer from its sunken position in the canal, but allowed her to remain to be removed by the libellant;

d. And in other respects as will appear at the trial.

14. All and singular the premises are true and within the admiralty and maritime jurisdiction of this Honorable Court.

Wherefore the libellant prays that process in due form of law according to the practice of this Honorable Court may issue against the said defendant, The T. A. Scott Company, Inc., and that it be ordered to appear before this court on such day as the court may direct and to answer under oath the interrogatories here subjoined, and that if the said company cannot be found, then the goods, chattels and effects thereof within the jurisdiction of this court may be attached to an amount sufficient to answer the libellant's claim, and that this Honorable Court will be pleased to decree to the libellant the payment of its damages sustained as aforesaid, and that the defendant be condemned to pay the same with interest thereon and the costs of this suit, and that the libellant may have such other and further relief as it may be entitled to receive.

AUGUST BELMONT,
for the Boston, Cape Cod and
New York Canal Company.

UNITED STATES OF AMERICA,
Southern District of New York,
County of New York:

January 8, 1917.

Personally appeared August Belmont and made oath that he is the President of the Boston, Cape Cod and New York Canal Company, that he has read the foregoing libel, that he has made investigation of the matters therein referred to, and what is alleged and stated therein is true to the best of his knowledge and belief.

Before me,

[SEAL.]

HARRY J. DIETRICH,
Notary Public.

STOREY, THORNDIKE, PALMER &
DODGE,
Proctors for the Libellant.

6 On the said tenth day of January, A. D. 1917, the following Interrogatories were propounded by the libellant to the defendant:

Interrogatories Propounded by the Libellant to the Defendant.

[Filed January 10, 1917.]

1. Under the laws of what State was the defendant, The T. A. Scott Company, Inc., organized and where is its principal place of business?

2. Of what does the business of the defendant consist?

3. Who were the president, directors and other officers of the defendant on December 13, 1916?

4. Was there in the employ of the defendant on December 13, 1916, a Captain Joseph Lewis?

5. If the answer to Interrogatory 4 is in the affirmative, what position did he hold with the defendant?

6. What agreement was made by the defendant with the White Oak Transportation Company whereby Captain Joseph Lewis went to the location of the Bay Port in the Cape Cod Canal on the evening of December 13, 1916? If the said agreement was in writing, annex a copy thereof; if oral, state the substance thereof.

7. As a result of what acts of the officers or agents of the White Oak Transportation Company did Captain Joseph Lewis go to the location of the Bay Port in the Cape Cod Canal on the evening of December 13, 1916?

8. At what time did Captain Joseph Lewis arrive at the said location of the Bay Port on December 13, 1916?

9. What was the position of the Bay Port in the Cape Cod Canal at the time of the arrival of Captain Joseph Lewis?

10. What was the position of the tug Dalzelline at the time of the arrival of Captain Joseph Lewis at the position of the Bay Port on December 13, 1916?

11. What was the position of the tug John C. Stuart at the time of the arrival of Captain Joseph Lewis at the position of the Bay Port on December 13, 1916?

12. What was the position of the tug Hazelton at the time of the arrival of Captain Joseph Lewis at the position of the Bay Port on December 13, 1916?

13. Were the engines of any of the said tugs running?

14. If the answer to Interrogatory 13 is in the affirmative, what tugs had their engines running at that time?

15. What action with reference to the Bay Port was taken by Captain Joseph Lewis on December 13, 1916, after his arrival at the position of the Bay Port in the Cape Cod Canal?

16. Did Captain Joseph Lewis give any orders to any of the said tugs on December 13, 1916?

17. If the answer to Interrogatory 16 is in the affirmative, what orders were so given? Please answer as to each tug.

18. What orders did Captain Joseph Lewis give to the captain, officers or crew of the Bay Port on December 13, 1916?

19. At what time on December 13, 1916, did Captain Joseph Lewis leave the said location of the Bay Port?

20. Whom did Captain Joseph Lewis leave in charge when he left the said location of the Bay Port on December 13, 1916?

21. What orders for the night did Captain Joseph Lewis leave when he left the said location of the Bay Port on December 13, 1916?

22. What tugs remained at the location of the Bay Port when Captain Joseph Lewis left on December 13, 1916, and what was the position of each tug?

23. Were the engines of any of the said tugs running at the time Captain Joseph Lewis left the location of the Bay Port on December 13, 1916?

24. At what time did Captain Joseph Lewis arrive at the location of the Bay Port on December 14, 1916?

25. What tugs were at the location of the Bay Port when Captain Joseph Lewis arrived on December 14, 1916, and what was the position of each tug?

26. Were the engines of any of the said tugs running at the time Captain Joseph Lewis arrived at the location of the Bay Port on December 14, 1916?

27. Was the Bay Port made fast to the bank of the canal at any time on December 13 or 14, 1916?

8 28. Was a diver sent down by Captain Joseph Lewis to examine the Bay Port on December 14, 1916?

29. If the answer to Interrogatory 28 is in the affirmative, what was done as a result of the examination of the diver?

30. Does the defendant own a lighter known as the "Salvor"?

31. If the answer to Interrogatory 30 is in the affirmative, who were the captain and other officers of the said lighter on December 14, 1916, and how large a crew did she have on that day?

32. Was the Salvor brought to the location of the Bay Port in the canal on December 14, 1916?

33. If the answer to Interrogatory 32 is in the affirmative, by whose orders was the Salvor brought?

34. If the answer to Interrogatory 32 is in the affirmative, what was done with the Salvor after she was brought?

35. Did Captain Joseph Lewis give any orders to the tugs Daltzeline, John C. Stuart and Hazelton on the morning of December 14, 1916?

36. If the answer to Interrogatory 35 is in the affirmative, what orders did Captain Joseph Lewis give to each tug?

37. What orders did Captain Joseph Lewis give to the captain, officers or crew of the Bay Port on the morning of December 14, 1916?

38. Did the Bay Port move from its location on the bank of the canal on the morning of December 14, 1916?

39. If the answer to Interrogatory 38 is in the affirmative, where was Captain Joseph Lewis at the time the Bay Port so moved, and what was he engaged in doing?

40. If the answer to Interrogatory 38 is in the affirmative, what were the captain and crew of the Salvor engaged in doing at that time?

41. If the answer to Interrogatory 38 is in the affirmative, what orders did Captain Joseph Lewis give at that time to the tugs Daltzeline, John C. Stuart and Hazelton? Please answer as to each tug.

9 42. If the answer to Interrogatory 38 is in the affirmative, what orders did Captain Joseph Lewis give at that time to the captain and crew of the Salvor?

43. If the answer to Interrogatory 38 is in the affirmative, what orders did Captain Joseph Lewis give at that time to the captain, officers and crew of the Bay Port?

44. If the answer to Interrogatory 38 is in the affirmative, what orders did Captain Joseph Lewis give to Pilot William Lewis at that time?

45. If the answer to Interrogatory 38 is in the affirmative, what other orders did Captain Joseph Lewis give at that time?

46. If the answer to Interrogatory 38 is in the affirmative, how much water was in the Bay Port at that time?

47. If the answer to Interrogatory 38 is in the affirmative, what was the position of the Bay Port in the canal immediately previous to so moving off the bank?

48. If the answer to Interrogatory 38 is in the affirmative, what was the position of the tug Dalzelline at that time?

49. If the answer to Interrogatory 38 is in the affirmative, what was the position of the tug John C. Stuart at that time?

50. If the answer to Interrogatory 38 is in the affirmative, what was the position of the tug Hazelton at that time?

51. If the answer to Interrogatory 38 is in the affirmative, were the engines of any of the tugs running at the time? Please answer as to each tug.

52. Did the Bay Port sink in the Cape Cod Canal on December 14, 1916?

53. Is the Bay Port still sunk in the Cape Cod Canal?

STOREY, THORNDIKE, PALMER &
DODGE,

*Proctors for the Boston, Cape Cod &
New York Canal Company.*

Stipulation to the Action.

On the twentieth day of January, A. D. 1917, appeared before Edward L. Owen, United States Commissioner at New York City, in the Southern District of New York, The T. A. Scott Company, Inc., by

10 T. A. Scott, its president. And the said The T. A. Scott Company, Inc., produced for surety before the United States District Court for the District of Massachusetts the Globe Indemnity Company. And the said The T. A. Scott Company, Inc., and the said Globe Indemnity Company, submitting themselves to the jurisdiction of this court, bound themselves, their successors or assigns, jointly and severally, in the sum of sixty thousand (60,000) dollars, unto the said libellant that the said The T. A. Scott Company, Inc., should abide by all orders and decrees, interlocutory or final, of the court, and should pay the amount of the final decree of the court, and all sums of money that it shall be ordered to pay by the final decree of the court, whether it be in this or any appellate court.

This cause was thence continued to the March Term, A. D. 1917, when, to wit, May 17, 1917, the following Answer, Answer to Interrogatories and Interrogatories was filed:

*Answer and Answers to Interrogatories Propounded by the Libellant
and Interrogatories Propounded by the Respondent.*

[Filed May 17, 1917.]

To the Honorable James Madison Morton, Jr., Judge of the District Court of the United States within and for the District of Massachusetts:

The Answer of The T. A. Scott Company, Inc., to the Libel of the Boston, Cape Cod & New York Canal Company against the said The T. A. Scott Company, Inc., in an alleged cause of damage, civil and maritime, respectfully alleges as follows, on information and belief:

I. The allegations contained in the first article of said libel are admitted.

II. Respondent admits the allegations contained in the second article of said libel that The T. A. Scott Company, Inc., was a corporation duly organized under the laws of the State of Connecticut, and that a part of its business was the removal of wrecked crafts, but denies that it had a usual place of business in Springfield, in
11 the District of Massachusetts, as alleged therein, and that its business was the repairing of damaged vessels.

III. Respondent admits the allegations of the third article of said libel that on December 13, 1916, in the early afternoon of said day the steamer Bay Port, laden with a cargo of coal, struck on the south bank of said canal, and that there was a small hole as a result of said striking on the starboard side of the said Bay Port forward of amidships, and that she was resting with her bilge on the south bank, but has no knowledge as to the remaining allegations contained in said third article and leaves the libellant to introduce proof in support thereof, if material.

IV. Respondent denies each and every allegation contained in the fourth article of said libel except that the tugs Dalzelline, Hazelton and John C. Stuart were present in the canal near the Bay Port.

V. Respondent admits the allegations contained in the fifth article of said libel.

VI. Respondent admits the allegations contained in the sixth article of said libel that on the morning of December 14, 1916, the said steamer Bay Port moved off the bank and at said times the tugs Dalzelline, Hazelton and John C. Stuart were by the Bay Port, and that Captain Joseph Lewis at the time was on the lighter Salvor, belonging to the respondent, which was alongside the Bay Port engaged in superintending the rigging of coal buckets to remove the Bay Port's cargo. Also that William Lewis, a licensed pilot, stepped from one of the tugs on board the Bay Port and that the Bay Port started her engines ahead, and that the steamtug Dalzelline got a hawser on the bow of the Bay Port and that subsequently the steamship Bay Port

struck the bank of said canal and sank diagonally across the said canal with her stern on the south bank, but denies each and every other allegation contained in the said sixth article.

VII. The respondent has no knowledge or information relative to the truth of the matters alleged in the seventh article of said libel and leaves the libellant to introduce proof in support thereof, if necessary.

12 VIII. Respondent admits the allegation contained in the eighth article of said libel that the Bay Port in her sunken location obstructed about one-half of said canal, but has no knowledge as to the truth of the remaining allegations of said article and denies the same.

IX. Respondent admits the allegation contained in the ninth article of said libel relative to notice to the respondent to remove the wreck, but denies the remaining allegations contained therein.

X. Respondent denies each and every allegation contained in the tenth article of said libel.

XI. Respondent has no knowledge or information relative to the truth of the matters alleged in the eleventh article of said libel and denies the same.

XII. Respondent denies each and every allegation contained in the twelfth article of said libel.

XIII. Respondent denies each and every allegation contained in the thirteenth article of said libel.

XIV. Respondent denies that all and singular the premises are true, as alleged in the fourteenth article of said libel.

Further answering, the respondent alleges:

XV. That at all the times hereinafter mentioned the respondent was a corporation organized and existing under and pursuant to the laws of the State of Connecticut, with its principal office and place of business at New London, State of Connecticut, and that at said times the respondent maintained and kept a wrecking plant at Boston, within the District of Massachusetts, and that the business of the respondent was assisting vessels in distress, bridge and pier building, and generally submarine work of all kind.

XVI. On information and belief, on the afternoon of December 13, 1916, Joseph M. Lewis, an employee of the respondent, in charge of a part of respondent's wrecking plant at Boston, was requested by the firm of Crowell & Thurlow, whom the respondent believes to be the operating agents of the steamship Bay Port, to proceed to the canal, which is owned, operated and controlled by the libellant, as the steamer Bay Port, laden with coal, was sunk in said canal. Thereupon the said Captain Lewis proceeded by train from Boston to said canal, arriving at said steamship in the evening of said day. That the said steamship Bay Port, a so-called whale-

13

back, was upon the southerly or starboard side of said canal, resting with her starboard bilge upon the side thereof, with No. 1, No. 2 and No. 3 holds partly filled with water, and with a list of from 10 to 11 degrees to port. All of the officers and crew of said steamship were aboard, with steam up on the steamship. The three steamtugs Dalzelline, Hazelton and John C. Stuart were at the wreck, and Joseph Lewis was informed all three steamtugs had been engaged in attempting to pull the Bay Port from the bank into deep water shortly after the stranding. The steamship's pump was in operation in an attempt to keep the said holds free from water. Captain Lewis made soundings upon the starboard side of said steamship and then on account of darkness proceeded to the libellant's office at the west end of the canal. On the following morning about 4 a. m. Captain Joseph Lewis proceeded to said wreck and with a diver examined the starboard side of said steamship Bay Port, and found just under the turn of the bilge leading into the No. 2 water bottom a small hole and a boulder immediately in front of said hole. The break was about 8 inches long and about 4 inches wide. Captain Lewis was informed that the steamship's pump had been going continuously since the said steamship commenced to leak. Said steamship was about 265 feet long and was reported to be drawing between 18 and 19 feet of water. The hole was plugged, the leak was stopped and the pump of the steamship kept going. The said steamship was laden with coal. The lighter Salvor, owned by the respondent, was alongside of said steamship and Captain Joseph Lewis was on said lighter, with the crew thereof, making preparations to put the said lighter in condition to remove the cargo in the forward part of said steamship on to the said lighter. At about 10.15 a. m., while Captain Joseph Lewis was on the said lighter Salvor, the bottom of the said steamship crushed the bank on which her starboard side was resting and a large quantity of the water having been pumped from her forward holds she slid off the bank into the deeper water of the canal. The steamship was heading to the eastward. Thereupon the canal pilot,

14 William T. Lewis, went upon the bridge of the said steamship and assumed command of her navigation, and the steamtug Dalzelline put a line on the bow of said steamship and proceeded ahead of her, assisting in the navigation of said steamship. The Salvor, which had been made fast to the said steamship, disconnected her lines therefrom. The said steamship after proceeding from a mile and a quarter to a mile and a half from the position where she was stranded, toward the eastern end of the canal, again struck the bank of said canal and stranded, where, the respondent is informed and believes, she still lies. At the place in the canal where the said steamship was first stranded there was neither dolphins, mooring spiles or any objects to which the said steamship could be made fast if necessary, and the anchors and chains of said steamship were insufficient to hold the said steamship upon said bank, if the same were desirable.

XVII. That the stranding of the said steamship Bay Port was not produced or caused by any negligence or carelessness upon the

part of the respondent, but was solely produced by the negligence of the libellant in the following particulars:

(A) That there was an insufficient depth of water in said canal for said steamship to navigate in safety on account of the draught of said steamship, which fact was well known to the libellant when the said steamship entered said canal.

(B) On account of the passage in said canal by steamships of great draught, permitted and encouraged by the libellant, shoals had been developed in said canal over which the steamship Bay Port could not be navigated in safety, which fact was well known to the libellant, and that a shoal had developed in said canal a short distance westward from where said steamship Bay Port become stranded over which it was impossible for the said steamship Bay Port to maintain steerage way and control of her movements. That in consequence thereof the said steamship took a sheer and struck the bank of said canal, causing her to strand in said canal.

(C) On account of the passage of deep draught vessels and the swift tidal currents in said canal the supporting rip-raps have bulged outward, the sand from the inside percolating through the
 15 same, many boulders have been exposed, and the said canal at the time of the stranding of the said steamship was in consequence thereof innavigable in fact to a steamship of her form of construction and draught of water, all of which facts were known to the libellant.

(D) The said libellant, on account of the danger attending the navigation of said canal, has kept and maintained a large fleet of steamtugs for the purpose of assisting vessels through the canal, and to render assistance in case of distress, and at the time of the stranding of said steamship Bay Port the said steamship was under the control and command of a canal pilot in the employ of the libellant, and of a steamtug under the control and direction of the libellant.

(E) From the time said steamship Bay Port entered the canal until the stranding of said steamship she was under the control and management of the libellant.

XVIII. All and singular the premises are true.

Wherefore respondent prays that said libel be dismissed with costs.

PARK & MATTISON,

Proctors for Respondent.

79 Wall Street, New York City.

CITY AND COUNTY OF NEW YORK,
Southern District of New York, ss:

Thomas A. Scott, being duly sworn, deposes and say that he is the president of The T. A. Scott Company, Inc., the respondent

herein. That he has read the foregoing answer, knows the contents thereof and that the same is true to the best of deponent's knowledge, information and belief. That the reason why this verification is made by deponent and not by said respondent is that respondent is a corporation of which the deponent is an officer, to wit, its ——. That the sources of deponent's information and the grounds of his belief in the premises are statements made to the deponent by the agents and employees of the respondent.

THOMAS A. SCOTT.

16 Sworn to before me this twenty-third day of February,

1917.

[SEAL.]

HENRY DE HONDT,

Notary Public (No. 56), New York County.

Answers to the interrogatories propounded by the libellant to the respondent, The T. A. Scott Company, Inc., are as follows, upon information and belief:

First. In answer to Interrogatory 1 it states: The T. A. Scott Company, Inc., was organized under the laws of the State of Connecticut, and its principal place of business is at New London, State of Connecticut.

Second. In answer to Interrogatory 2 it states: The business of the defendant consists of wrecking and salvage operations, bridge, pier and foundation construction, dredging, and in general maritime services of all kinds.

Third. In answer to Interrogatory 3 it states: President, Thomas A. Scott; vice-president, John A. Scott; secretary, Andrew B. Parrish; treasurer, William A. Fones; engineer, Byron A. Fones; manager of stores, Harry J. Meadnis; directors, Thomas A. Scott, John A. Scott, Byron A. Fones, William A. Fones, Matthew Brown, Harriet A. Scott and Andrew B. Parrish.

Fourth. In answer to Interrogatory 4 it states: Yes.

Fifth. In answer to Interrogatory 5 it states: Employee.

Sixth. In answer to Interrogatory 6 it states: About 3.30 P. M. December 13, 1917, Mr. Freeman, of the firm of Crowell & Thurlow, operating agents of the steamship Bay Port, requested by telephone Captain Joseph Lewis to catch, if possible, the 4.30 train from Boston to Buzzard's Bay, stating the steamship Bay Port was in trouble in the canal. Captain Lewis replied that he would go. There was no further conversation.

Seventh. In answer to Interrogatory 7 it states: The answer to this interrogatory is contained in the answer to the 6th interrogatory.

Eighth. In answer to Interrogatory 8 it states: About 6.45 p. m.

17 Ninth. In answer to Interrogatory 9 it states: The starboard bilge of the Bay Port was on the bank and she was heading to the eastward.

Tenth. In answer to Interrogatory 10 it states: Three tugboats, the Dalzelline, the Hazelton and the John C. Stuart, were alongside

of the Bay Port, two at her bow and one at her stern, but the respondent does not recollect the relative positions of the said steamtugs.

Eleventh. In answer to Interrogatory 11 it states: The answer to this interrogatory is contained in the answer to Interrogatory 10.

Twelfth. In answer to Interrogatory 12 it states: The answer to this interrogatory is contained in the answer to Interrogatory 10.

Thirteenth. In answer to Interrogatory 13 it states: No.

Fourteenth. In answer to Interrogatory 14 it states: The answer to this interrogatory is contained in the answer to Interrogatory 13.

Fifteenth. In answer to Interrogatory 15 it states: A memorandum of soundings were made covering the time she had stranded up to the time of the arrival of Captain Lewis after which Captain Lewis returned to Buzzard's Bay office of the libellant.

Sixteenth. In answer to Interrogatory 16 it states: No.

Seventeenth. In answer to Interrogatory 17 it states: The answer to this interrogatory is contained in the answer to Interrogatory 16.

Eighteenth. In answer to Interrogatory 18 it states: No orders were given.

Nineteenth. In answer to Interrogatory 19 it states: About 7 p. m.

Twentieth. In answer to Interrogatory 20 it states: No one was left by Captain Joseph Lewis in charge of the Bay Port.

Twenty-first. In answer to Interrogatory 21 it states: No orders were given by Captain Joseph Lewis relative to the steamship Bay Port.

Twenty-second. In answer to Interrogatory 22 it states: There was one tug on each end of the ship; their names are not recalled.

Twenty-third. In answer to Interrogatory 23 it states: No.

Twenty-fourth. In answer to Interrogatory 24 it states: About 4 a. m.

18 Twenty-fifth. In answer to Interrogatory 25 it states: One was hanging on each end the same as the night before when Captain Lewis left. Their names are not recalled.

Twenty-sixth. In answer to Interrogatory 26 it states: No.

Twenty-seventh. In answer to Interrogatory 27 it states: It does not think the Bay Port was made fast to the bank of the canal by lines or chains but she was fast to the bank with a port list.

Twenty-eighth. In answer to Interrogatory 28 it states: Yes.

Twenty-ninth. In answer to Interrogatory 29 it states: A leak was discovered which was closed by wedges.

Thirtieth. In answer to Interrogatory 30 it states: Yes.

Thirty-first. In answer to Interrogatory 31 it states: Captain A. J. Daley, chief engineer, Eugene Fullerton and a crew of about 14 men.

Thirty-second. In answer to Interrogatory 32 it states: Yes.

Thirty-third. In answer to Interrogatory 33 it states: By order of Captain Joseph Lewis.

Thirty-fourth. In answer to Interrogatory 34 it states: She was getting ready to remove coal from the Bay Port.

Thirty-fifth. In answer to Interrogatory 35 it states: No.

Thirty-sixth. In answer to Interrogatory 36 it states: The answer to this interrogatory is contained in the answer to Interrogatory 35.

Thirty-seventh. In answer to Interrogatory 37 it states: No orders were given by Captain Joseph Lewis to the captain, officers or crew of the Bay Port.

Thirty-eighth. In answer to Interrogatory 38 it states: Yes.

Thirty-ninth. In answer to Interrogatory 39 it states: Captain Joseph Lewis was on the Salvor superintending the work of erecting her coal hoist for the removal of coal.

Fortieth. In answer to Interrogatory 40 it states: The captain and crew of the Salvor were engaged in the same operation.

Forty-first. In answer to Interrogatory 41 it states: No orders were given by Captain Joseph Lewis to either of said steamtugs.

Forty-second. In answer to Interrogatory 42 it states: Orders were given to let go the lines and get away from the ship.

19 Forty-third. In answer to Interrogatory 43 it states: Gave no orders.

Forty-fourth. In answer to Interrogatory 44 it states: At the time the Bay Port left the bank, pilot William Lewis was on one of the tugs. He immediately jumped aboard the ship and went on to the bridge. No orders were given.

Forty-fifth. In answer to Interrogatory 45 it states: No orders were given.

Forty-sixth. In answer to Interrogatory 46 it states: No. 1 and 3 water bottoms were apparently pumped out; the water in No. 2 was one foot below water bottom. There was considerable water in the cargo space, but no means of actually determining the amount.

Forty-seventh. In answer to Interrogatory 47 it states: The Bay Port was practically in the same position as the night before, comparatively parallel with the bank, and with a port list.

Forty-eighth. In answer to Interrogatory 48 it states: The Dalzell line lay alongside the port bow of the Bay Port heading the tide.

Forty-ninth. In answer to Interrogatory 49 it states: The John C. Stuart was alongside on her port quarter heading the tide.

Fiftieth. In answer to Interrogatory 50 it states: The Hazelton lay alongside the Dalzell line.

Fifty-first. In answer to Interrogatory 51 it states: They were not.

Fifty-second. In answer to Interrogatory 52 it states: Captain Lewis was informed that the Bay Port had sunk about a mile and a half further to the eastward and, subsequently, discovered the information was correct.

Fifty-third. In answer to Interrogatory 53 it states: The answer to this interrogatory is peculiarly within the knowledge of the libellant, and the respondent's knowledge is predicated upon information.

THE W. A. SCOTT COMPANY, Inc.,
By THOMAS A. SCOTT,

President.

20 STATE OF NEW YORK,
County of New York,
Southern District of New York, ss:

Thomas A. Scott, being duly sworn, says that he is the president of The T. A. Scott Company, a corporation, and the respondent

herein; that he has read the foregoing answers to interrogatories propounded to it by the libellant, and that the same are true to the best of deponent's knowledge, information and belief.

THOMAS A. SCOTT.

Sworn to before me this twenty-third day of February, 1917.

[SEAL.]

HENRY DE HONDT,
Notary Public, New York County (No. 56).

Interrogatories Propounded by the Respondent to the Libellant, The Boston, Cape Cod & New York Canal Company, to be Answered Under Oath.

I. Who are the officers and directors of the Boston, Cape Cod & New York Canal Company, and where is its principal place of business?

II. Who are the officers and directors of the Cape Towing Corporation, and where is its principal place of business?

III. From whom do the masters of the steamtugs John C. Stuart, Hazelton and Dalzelline receive their orders in relation to their work in or about the canal?

IV. If the answer to Interrogatory III refers to any person connected with the Cape Towing Corporation, state what position that person holds with the Boston, Cape Cod & New York Canal Company.

V. State what agreement or arrangement exists between the Boston, Cape Cod & New York Canal Company and the pilots of the so-called Cape Pilot Association relative to their compensation.

VI. State from whom the pilots of this so-called Cape Pilot Association receive their orders relative to the pilotage of any vessel through the canal.

21 VII. State if any employee of the Boston, Cape Cod & New York Canal Company holds any office in the Cape Towing Corporation.

VIII. In whom at the time of the stranding of the steamship Bay Port was the title of the steamtugs John C. Stuart, Hazelton and Dalzelline?

IX. If the title of said steamtugs were not in the name of the Cape Towing Corporation, state what arrangements or agreement existed between the libellant and the owners of said steamtugs as to their use in the canal.

At the same term, to wit, May 24, 1917, the following Answers to Respondent's Interrogatories was filed:

Libellant's Answers to Respondent's Interrogatories.

[Filed May 24, 1917.]

1. The officers of the Boston, Cape Cod & New York Canal Company at the time of the accident were: August Belmont, president; J. W. Miller, vice-president; J. J. Coakley, treasurer; Charles Maass, secretary; Charles H. Allen, F. R. Appelton, August Belmont, Dewitt C. Flanagan, W. A. Harriman, L. F. Loree, J. W. Miller, William Barclay Parsons, F. de C. Sullivan, F. D. Underwood, H. P. Wilson, directors. The principal place of business of the Boston, Cape Cod & New York Canal Company is at Buzard's Bay in the District of Massachusetts.

3. From the manager of the Cape Towing Corporation.

4. At the time of this accident E. R. Geer was superintendent of the Boston, Cape Cod & New York Canal Company as well as manager of the Cape Towing Corporation.

5. No agreement or arrangement exists. At the time of the accident the Boston, Cape Cod & New York Canal Company guaranteed that the pilots would earn a certain amount, but were never called upon to make any payment on account of the guarantee.

6. No one.

7. No employee of the Boston, Cape Cod & New York Canal Company holds office in the Cape Towing Corporation.

AUGUST BELMONT.

22 Subscribed and sworn to before me this eighth day of May, 1917.

[SEAL.]

HARRY J. DIETRICH,
Notary Public.

This cause was thence continued from term to term to the March Term, A. D. 1918, when this cause came on to be heard, and was fully heard by the court on the nineteenth, twentieth, twenty-first, twenty-second, twenty-sixth, twenty-seventh and twenty-eighth days of March, and on the tenth day of April, A. D. 1918, a decision was announced by the court.

This cause was thence continued to the present June Term, A. D. 1918, when, to wit, September 4, 1918, the following Final Decree is entered:

Final Decree.

September 4, 1918.

MORTON, J.:

This cause came on to be heard, and after a full hearing, and arguments of counsel, and in accordance with the terms of the opinion in this case filed, it is now, to wit, September 4, 1918,

Ordered, adjudged and decreed that the libel be dismissed and that the respondent recover of the libellant costs as taxed by the clerk in the sum of four hundred forty-six and fifty-one one-hundredths dollars, together with interest thereon from the date hereof until paid; that unless this decree be satisfied or proceedings thereon be stayed by appeal within the time and in the manner prescribed by law and the rules and practice of this court, execution shall issue accordingly.

By the Court,

FRANK H. MASON,
Deputy Clerk.

Approved as to form.

CURRIER, YOUNG & PILLSBURY,
*Proctors for Boston, Cape Cod &
New York Canal Company.*

PARK & MATTISON,
Proctors for T. A. Scott & Company, Inc.

23 From the foregoing decree, the libellant claims an appeal to the United States Circuit Court of Appeals for the First circuit and gives good and sufficient security that it will prosecute its appeal to effect and answer all damages and costs if it fail to make its appeal good, and said appeal is allowed accordingly.

Memorandum of Decision.

April 10, 1918.

No. 1517, Civil.

BOSTON, CAPE COD & NEW YORK CANAL COMPANY

v.

T. A. SCOTT COMPANY, INC.

No. 1518, Civil.

BOSTON, CAPE COD & NEW YORK CANAL COMPANY

v.

WHITE OAK TRANSPORTATION COMPANY.

No. 1555, Civil.

WHITE OAK TRANSPORTATION COMPANY

v.

BOSTON, CAPE COD & NEW YORK CANAL COMPANY.

MORTON, J.:

This litigation arises out of the two strandings of the steamer Bay Port in the Cape Cod Canal. The determination of the causes of

those accidents, and the responsibility for them will, in effect, dispose of most or the questions presented by the somewhat involved pleadings in the three cases.

The Bay Port was a whale-back steamer 265 feet long, carrying about 2,400 tons of Coal. On the evidence now before the court she appears to have been a staunch vessel properly manned, supplied and equipped. No failure of her mechanism entered into either accident. She steered as well as the ordinary whale-back steamer; but vessels of that type do not handle as sharply, nor as well, as those of the usual deep-sea model. She was deeply laden; but not so as to interfere with her ability to manœuvre.

The canal is one of the well known waterways on this part of the coast. Competent navigators may be assumed to be familiar with its general characteristics. It is a narrow channel, of no great depth, in which at times heavy tidal currents exist. The Canal Company does not guarantee the safety of vessels using the canal; its obligations are not to misrepresent what it offers, and to

24 use reasonable care for the safety of vessels which accept its offer and avail themselves of the canal.

On December 13, 1916, the Bay Port appeared at the Buzzard's Bay entrance to the canal and requested passage through. She was required by the Canal Company to take a pilot for the canal; and Captain Rochester, who held a United States license for it, went down to her. The owner of the Bay Port,—and I understand that the owners of the cargo adopt the same position,—expressly disclaims any charges of negligence against the pilots and tugs in respect to either accident. So that it is perhaps unnecessary to determine the exact relation between pilots Rochester and W. Lewis and the Canal Company and between the tugs that assisted the Bay Port and the Canal Company. I may say, however, that in view of the public and general announcement of the Canal Company early in September, 1916, by circulars to the shipping trade, that thereafter the pilots and tugs would not be in its employ, and of the arrangements then made, I do not think that, at the time of the accident, either the pilots or the tugs were so far agents or servants of the Canal Company as to make it responsible for their negligence. They had previously been so, and that relation had largely increased the liability of the company for accidents in the canal. Undoubtedly the new arrangement of September, 1916, was made for the purpose of avoiding a continuation of that liability. But even so, it was a change which the Canal Company had a right to make, provided it did so in an open and public manner, and did not mislead vessels into a belief that the old arrangement still continued. Rochester is to be regarded as an independent pilot employed by the Bay Port on her own account to assist her through this somewhat difficult waterway.

The Canal Company signalled that the canal was open for vessels bound east; and by Rochester's orders the Bay Port got under way and proceeded into the canal. It was about half tide, and there was a strong head-current of three or four knots an hour run-

ning west in the canal. The steamer took the assistance of the tug Dalzelline, which went ahead on a short hawser.

25 The tug and steamer progressed satisfactorily through the first two bridges into the long stretch between the Bourne and Sagamore bridges. At a point about two miles east of the Bourne bridge the Bay Port swerved (or sheered) slightly toward the north bank. This sheer does not seem to have been of much consequence. Captain Hammett testifies in reference to it:

"Q. Was the sheer to port of any consequence?

A. Not very much; very slight.

Q. Was it of any consequence at all?

A. What say?

Q. Was it of any consequence?

A. Why, a little; you could call it of consequence or not, just as you like.

Q. I want your idea.

A. I say, I don't know. It was very little; I couldn't say whether it was two feet or four feet,—it was a little sheer.

Q. Little sheer?

A. Yes, sir."

After the swing was checked the steamer straightened out and went on a short distance nearer the north bank, and parallel with it. Her helmsman testifies: "I know she was some little distance out,—out of the centre." * * * "Towards the port bank and running along parallel with it." * * * "she would not swing away from it." * * * "Clung to the bank." An effort was made to bring her back to the centre of the channel, and the helm was put to port for that purpose. She seems not to have minded it readily, and the amount of helm was increased. Then the Bay Port suddenly left the north bank, and started on a sharp sheer across the canal. The situation was immediately recognized as an emergency; her helm was reversed and put hard-a-starboard; her engines were backed, and the tug tried to pull her straight. The result of these efforts was that she straightened out, but not before she was so close to the south bank that her bow stranded on it, about her length, or a length and a half, from where the sheer started; and she lay there nearly parallel with the canal. The tide was falling, and the efforts immediately made to pull her off proved unsuccessful. This constitutes the first of the two accidents which figure in the case. The Canal Company suffered no appreciable damage from it.

In order to discuss the steamer's charges of fault against the Canal Company for this accident, a more detailed description of the canal at this point is required. The Canal Company 26 represented to the public that the canal had twenty-five feet of water at mean low tide. This representation was known to Captain Hammett of the Bay Port. The canal had been dug to that depth, but the action of currents and other forces constantly tended to create shoals in it. One of these shoals the Bay Port had passed over shortly before taking her sheer to the north bank.

It had about nineteen and a quarter feet of water at mean low tide, on the shallowest spot, and at the time in question,—the tide being about half up,—about two and a half feet more, i. e., from twenty-one to twenty-two feet. The draft of the Bay Port was about eighteen feet, two inches; so that there were three or four feet of water under her on the shoal. It terminated about one thousand feet from where the Bay Port hit the south bank; and for the intervening distance there was more than twenty-five feet of water at a mean low tide.

A short distance west of where the Bay Port struck there was, on the north bank of the canal, a slight projection, the remains of the final dam which separated the two ends of the canal during construction. This projection, or "knuckle," as it has been called, did not extend into the channel of the canal, nor far enough out from the bank to constitute in itself any menace to navigation. On a westerly tide it set up a surface current which slanted towards the south bank. It seems probable that, after the Bay Port had begun to turn away from the north bank, she was caught by this current, as well as by the general current in the canal, and that the cross-current was one of the forces which prevented her from being controlled in time to avoid stranding.

The evidence for the Bay Port is that, unless a vessel like her has from three to five feet of water under her bottom, she is likely to "smell the ground," as it is called, which interferes with her steering and may cause her to sheer. The Transportation Company contends that this is what occurred when the Bay Port crossed the shoal above referred to, and was the reason why she swerved towards the north bank; that from that point she was in effect out of control; and that the shoal was, therefore, the proximate cause of the stranding.

27 It does not seem to me, however, that the facts support this contention. The eastern edge of the shoal was, as above stated, almost one thousand feet from where the Bay Port struck. She passed safely over it, and its effect on her steering did not extend beyond the time when the sheer to the north bank,—assuming that the shoal caused that sheer, which is by no means certain,—was checked. Thereafter she "clung to the bank," as her helmsman puts it. Neither he, nor her pilot nor her captain, all of whom have testified at length in these proceedings, appears to have regarded her situation as dangerous while she was doing so. Her speed was not slowed, nor was the tug called upon for help. The causes of the stranding seem to have been the large amount of port helm which, by the pilot's orders, had been given the steamer to bring her away from the bank, the suddenness with which she finally minded her helm and the unexpectedly large swing which she took, the general current and cross-current in the canal, all of which acting together made it impossible to control her in time to prevent her from striking. The "knuckle" and the current occasioned by it were well known to the canal pilots and were customarily allowed for in navigating at that point. Vessels constantly passed it safely. It does not seem to me that the condition

of the canal there was such as to warrant a finding of negligence against the Canal Company for permitting the Bay Port to use the canal. The Canal Company was not at fault for the first stranding, which appears to me to have been due either to pure accident, or to faulty navigation by the pilot.

As to the second stranding: The T. A. Scott Company was asked to come to the assistance of the stranded Bay Port, and promptly did so, beginning work that evening. Its men stopped the small hole in her hull, made when she struck the bank, and had begun to remove her cargo, when she suddenly and unexpectedly floated at about half tide, shortly after ten o'clock on the following morning. Her captain and crew had remained on board and were on her at the time. W. Lewis, a canal pilot of recognized ability, was also on her. Just why he was there is not clear,—apparently it was to complete the job, which Rochester had undertaken the previous day, of piloting the steamer through the canal. He and her captain at once hurried to her bridge, and her crew to their stations. There was a strong current flowing east, the direction in which the steamer was going. No arrangements had been made to hold her to the bank, and, as soon as she left it, she was seized by the current and swept along at a speed of three or four miles per hour. Three tugs were around her with steam up, and the Bay Port also had steam on her own boilers. She was, by reason of the water which she had taken in, down by the head. The day before she had drawn less at the bow than at her stern; she now drew, according to Captain Hammett, about 18 inches more at the bow; and she had a list to port.

These changes in her trim certainly did not improve her steering qualities; probably they appreciably impaired them. Captain Hammett testified:

"Q. And did she steer as well as she had the day before, or was she logier?

A. She might have been a little logier, I couldn't say as to that.
Q. A little logier?

A. Might have been a little logier, but steered all right.

Q. Did you have any difficulty in steering her during the first half mile or so?

A. No, sir; none."

As the steamer did not take on steerage way until she had floated a considerable distance, it would appear, on her own testimony, that she began to steer badly almost as soon as she began to steer at all. On the testimony of pilot Lewis, she ran from the very beginning "a very zigzag course." He says: "We stopped her engines and let her drift as much as we could, because we couldn't do nothing with her, she was drifting from one side to the other." Captain Le-compte, who commanded the tug Dalzelline, that was ahead of the Bay Port on a hawser at this time, testifies: "She commenced swinging, you know, backward and forward; she would take sheers, you know. We had a short hawser and we held her straight two or three times before she did land."

It is charged as a fault against the Scott Company, in the libel

and intervening petition against it, that it failed to make adequate preparations to hold the steamer safely if she should come off. The evidence that it could not have done so by ground-tackle, without greatly delaying salvage work, which would have been inad-
29 visable, is so clear and convincing that discussion of the point seems unnecessary. As soon as she floated, pilot Lewis, with her master's assent, assumed control of her, and the Scott Company had nothing to do with the orders he gave. Its salvage work was for the time being suspended; the steamer went forward on her own account, not under control of the Scott Company as part of the salvage operations.

The courses open when the Bay Port floated were, either to hold her in the channel where she came off, by tugs, or to drop her down to some dolphins and tie her there for the time being,—both of which, it seems clear, could have been done,—or to take her on through the canal. The question had been discussed by Captain Hammett, Captain Joseph Lewis (of the Scott Company) and pilot Lewis. The Canal Company wanted to get her out of the canal as soon as possible, and its superintendent had so told pilot Lewis.

It was generally understood among all parties interested that, when the Bay Port came off, she should, if possible, be taken through to Sandwich at the eastern end of the canal. Captain Hammett testified on this point:

“Q. Was anything said as to tying up at Sandwich, do you remember?”

A. I don't know as there was. I think that that was generally understood, that that was where she was to go if she floated, that she was to tie up at Sandwich.

Q. Well, understood by whom?

A. Why, generally understood. I think that was talked over, that if she floated, why, I would take her down and tie her up at Sandwich.

Q. When was that talked?

A. I think it was talked,—might have been the night before, or that day, I can't say; I just remember some conversation in regard to that matter, in that line.

Q. With whom?

A. Why with Captain Lewis and the pilot, and I guess myself,—I don't know but Mr. Gardner (of the Scott Company). The talk was all general; I couldn't specify exactly just when or who was there.” * * *

“Q. Did that seem to you to be the proper thing to do?”

A. I think so; yes, sir.

Q. In the event of her floating, she was to be tied up at Sandwich?

30 A. I think so; yes, sir,—that was the general impression.”

The sudden and unexpected floating of the steamer and her being caught by the current in the narrow channel created a serious emergency. Captain Joseph Lewis, who was at the time on the lighter Salvor, alongside the Bay Port, called to Pilot Lewis on the steamer's bridge, “She is yours,” or words to that effect,—to which pilot Lewis assented. From that time until after

the accident, the Scott Company, as before stated, had nothing more to do with the steamer and exercised no control over her. Pilot Lewis assumed command of her. By his orders, one of the tugs (the Dalzelline) took a short hawser ahead; another pushed the steamer's stern straight with the canal and then took away the lighter; the third tug, apparently without orders, swung out into the current, and started out after the steamer with the idea of getting a line on her stern. The order was given to start the steamer's engines full speed ahead, in order to obtain steerage-way. Meanwhile the Bay Port was drifting along the canal, going in this manner perhaps a third of a mile. Then by the action of her own engines and of the tug ahead she obtained steerage-way through the water and took on a speed over the ground of about six miles per hour.

Some dolphins where she might have been tied up were passed without any effort to place her there. Shortly afterward, the tug Hazleton came up behind the Bay Port and offered a line to her quarter. The men on the Bay Port were so much occupied that nobody took it. The Bay Port, continuing on, sheered toward and narrowly missed the dredge Trilby at work in the canal. This sheer was broken by the tug and the steamer's helm. A short distance further on, the Bay Port again sheered toward the south bank; and again the sheer was broken. She then sheered toward the north bank and, in spite of all efforts to check her, stranded heavily there. Her stern swung across the canal and struck the south bank; the bow came clear, moved a short distance down stream, and again grounded. She sank almost immediately from injuries to her hull and became a total loss, the wreck being destroyed some weeks later.

About two thousand feet west of where the Bay Port finally landed, she passed over a shallow spot much like that above
31 described in connection with the first stranding. There was everywhere on it, except close to the sides of the channel, twenty feet of water at mean low tide; and at the time of the accident,—the tide being about half up,—about three feet more, i. e., about twenty-three feet. It is contended by the owner of the Bay Port that the shoal caused her to sheer and was the proximate cause of the accident; and that the Canal Company is therefore liable. This shoal was farther from the place of the final accident than the first shoal was from the first accident. Throughout the intervening distance there was at least twenty-five feet of water at mean low tide. Two separate sheers were taken and broken after passing the shoal before the steamer finally struck. It seems to me that even if the shoal be regarded as a negligent obstruction in the canal, it was not the cause of the accident.

From what has been said, it follows that the charges of negligence against the Canal Company by the Transportation Company have not been sustained, and that the libel against it must be dismissed. No charges are made here by any party against the pilots; their conduct need not be further scrutinized. The Scott Company was not negligent in failing to hold the vessel to the bank. When she floated, it immediately surrendered her to her master and pilot,

accepted her without objection; thereafter it exercised no control over her movements. No sufficient reason appears for holding it at fault in any respect. The libel and the intervening petition against it must be dismissed.

As to the libel of the Canal Company against the Transportation Company: the first three charges of fault in this libel allege (in substance) negligence on the part of the owner of the Bay Port in taking her into the canal at all, on the ground that she did not steer well enough to attempt the passage of such a place with safety. It does not appear, however, that the ability of the Bay Port to manœuvre was inferior to that of the ordinary steamer of her size and type. It was a fairly common type, the characteristics of which were known to the Canal Company. The Transportation Company had been solicited by the Canal Company to send its steamers, including the Bay Port, through the canal. It can hardly
32 be held negligent for accepting the invitation of the libellant. These charges are not sustained.

It is further charged that the Transportation Company was negligent for suffering the steamer to become afloat in an unsafe condition for navigation in the canal. The salvage work was, however, in charge of an independent contractor, The T. A. Scott Company. The Transportation Company exercised no control over it. After the Bay Port came off the bank she could have been held in the stream by the tugs till slack water, or she could have been tied to the dolphins. Her floating off was not the proximate cause of the accident. The Canal Company's libel does not charge negligence in the management of the steamer while she was in the pilot's charge after she came off the bank; and no such contention has been made by it. It is further argued by the Canal Company,—under what charge in the libel is not clear,—that Captain Hammett was at fault for not preventing pilot Lewis from attempting to take the Bay Port through the canal after she floated. This question is not free from doubt. The day before, under much safer conditions both of current and of trim, the Bay Port had been unable to go through safely. It is evident that a great mistake was made in supposing that it was safe to renew the attempt under the conditions existing when she came off the bank. It is, however, to be remembered that the decision to go on was made under the pressure of an unexpected emergency (caused by the floating of the steamer so long before high water that the tide was still running at full strength), and that it followed out the plan of action which had received the assent of all parties in interest, including the Canal Company, although nobody foresaw the situation which actually presented itself. Captain Hammett was unfamiliar with the canal. He had been through it only a few times, and never with a loaded vessel. He was not pilot for it and had no intimate knowledge of the dangers which navigation there involved. He was without experience in handling vessels in the canal. The question presented was not one of ordinary navigation, but of navigation under very
33 uncommon conditions and with reference to a peculiar waterway. Pilot Lewis was in many ways better qualified than Captain Hammett to decide what to do.

The failure to tie up at the dolphins which were passed before the accident seems hard to justify on the evidence before the court. They were reached after the first crisis of the emergency had gone by, and there had been time to consider what should be done. With the help of the tugs and her own engines the Bay Port could easily have been placed at them. While there, she would, however, have substantially obstructed the canal; and I have no doubt that, in failing so to deal with her, pilot Lewis had in mind Captain Geer's instructions to get out of the canal if possible. It does not appear that Captain Hammett knew about the dolphins before reaching them; and he testifies that even now he could not say whether it would have been safe to tie the Bay Port to them, or not,—a statement which I believe. Considering all the circumstances, I think Captain Hammett was not negligent for not preventing pilot Lewis from attempting to take the ship through to Sandwich.

The charge of fault against the Transportation Company for not sooner removing the wreck has not been argued; and on the evidence before the court it does not appear that the Transportation Company was negligent in that respect. The libel of the Canal Company, against the Transportation Company must also be dismissed.

In view of the possibility of appeal, there ought, perhaps, to be a decision upon the question presented by the request for limitation of liability contained in the answer of the Transportation Company. This matter was expressly reserved and has not been heard. Upon a request by either party filed with the clerk within ten days, the case will be set down for further hearing upon this issue. If no such request is made, the question will be decided on the evidence as it now stands.

Decrees accordingly.

34 *Motion to Extend Time for Claiming Appeal.*

[Filed September 11, 1918.]

Now comes the libellant in the above-entitled case and moves this court that the time for claiming its appeal and for filing its assignment of errors be extended for a period of thirty days from September 4, 1918, to and including October 4, 1918.

By it Proctors,

CURRIER, YOUNG & PILLSBURY.

Assented to.

PARK & MATTISON,
Proctors for Respondent.

Time extended as above.

J. M. M., JR.

Libellant's Petition for Appeal.

[Filed September 26, 1918.]

The Boston, Cape Cod & New York Canal Company, libellant in the above case, being aggrieved by the decree, rulings and findings therein of the District Court of the United States for the District of Massachusetts, claims an appeal from said decree, rulings and findings and prays that its said appeal may be allowed, and it hereby files with its claim of appeal the following assignment of errors.

By its Proctors,

CURRIER, YOUNG & PILLSBURY.

Assignment of Errors.

[Filed September 26, 1918].

And now comes the Boston, Cape Cod & New York Canal Company, appellant, and makes and files this its assignment of errors.

1. The District Court erred in finding that the salvage work of the respondent was for the time being suspended when the Bay Port came afloat.

35 2. The District Court erred in finding that after the Bay Port came afloat she went forward on her own account and not under the control of the respondent as part of its salvage operations.

3. The District Court erred in finding that the respondent was not negligent in failing to make the Bay Port fast to the bank before she came afloat.

4. The District Court erred in finding that after the Bay Port came afloat the respondent had nothing more to do with the steamer and exercised no control over her.

5. The District Court erred in refusing to find the respondent failed to make adequate preparations to hold the steamer safely if it should come off.

6. The District Court erred in finding that the respondent was not negligent in failing to hold the vessel to the bank.

7. The District Court erred in finding that the respondent immediately surrendered the Bay Port to the master and pilot when she came afloat on December 14, 1916.

8. The District Court erred in finding that pilot Lewis assented to any surrender of the vessel to him by Captain Joseph Lewis of the respondent.

9. The District Court erred in finding that as soon as the steamer floated, pilot Lewis, with her master's consent, assumed control or command of her.

10. The District Court erred in admitting against the objection and subject to exception of the libellant the question to the witness Edward R. Geer and his answer thereto with reference to the person in charge of the Bay Port when she came afloat, as follows:

"Q. 106. When she came off the bank with the hole on her star-board side plugged up and her own pumps having control of her, pilot Lewis was on board?

A. Yes, sir.

Q. 107. And the three tugs were alongside?

A. Yes, sir.

Q. 108. In that situation who had charge of the navigation of that ship through the canal?

Mr. Pillsbury: I think that is purely a question of law.

Mr. Parks: It is a question of fact.

The Court: I think he may state, yes.

Mr. Pillsbury: Will your Honor save my exception?

The Court: Yes, I will save your exception.

36 A. Just as soon as that ship left the bank while pilot Lewis was in full charge he would give the orders, whatever he saw fit. He had full charge of everything just as soon as she left the bank."

11. The District Court erred in refusing to find that the respondent through its agents assumed charge of the Bay Port and negligently cared for the said steamer while she was resting on the bank subsequent to the accident of December 13 and negligently suffered the said steamer to come afloat in an improper and unsafe condition.

12. The District Court erred in refusing to find that the respondents after assuming charge of the Bay Port subsequent to the accident of December 13, negligently permitted the Bay Port to become afloat in the said canal in an unsafe condition for navigation and negligently failed to be prepared to complete the passage through the canal by the Bay Port, as a result of which she sank in the channel.

13. The District Court erred in entering a final decree dismissing the libel herein.

14. The District Court erred in refusing to enter a decree in favor of this libellant for the damages sustained by it by reason of the Bay Port coming afloat in an unsafe and unseaworthy condition and sinking in the canal on December 14, 1916, as set forth in the pleadings herein, with interest and costs, and in not adjudging the respondent and its agents and servants at fault for said sinking.

Dated Boston, September 26, 1918.

CURRIER, YOUNG & PILLSBURY,
Proctors for Libellants and Appellants.

Bond of Appeal.

[Filed and Approved September 26, 1918.]

Know all men by these presents, that we, Boston, Cape Cod & New York Canal Company, a corporation duly organized and existing under the laws of the Commonwealth of Massachusetts, as principal, and National Surety Company, a corporation organized under the laws of the State of New York, and having a usual
37 place of business in Boston, in said Commonwealth, as surety, are held and firmly bound unto the T. A. Scott Company, Inc., a corporation duly organized and existing under the laws of the State of Connecticut, in the full and just sum of two hundred and fifty dollars (\$250) to be paid to the said T. A. Scott Company, Inc., its successors or assigns: to which payment, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, by these presents. Sealed with our seals and dated this thirteenth day of September in the year of our Lord one thousand nine hundred and eighteen.

Whereas, lately at a District Court of the United States for the District of Massachusetts, in a suit in admiralty depending in said court between Boston, Cape Cod & New York Canal Company and T. A. Scott Company, Inc., a decree was entered against the said Boston, Cape Cod & New York Canal Company, and the said Boston, Cape Cod & New York Canal Company having obtained an appeal to remove said cause to the United States Circuit Court of Appeals for the First Circuit, to reverse the decree in the aforesaid suit, and a citation directed to the said T. A. Scott Company, Inc., citing and admonishing it to be and appear in the said United States Circuit Court of Appeals for the First Circuit, in the City of Boston, Massachusetts, on the twenty-fifth day of October next.

Now, the condition of the above obligation is such, that if the said Boston, Cape Cod & New York Canal Company shall prosecute its appeal to effect, and answer all damages and costs if it fail to make its appeal good, then the above obligation to be void; else to remain in full force and virtue.

[SEAL.]

BOSTON, CAPE COD & NEW YORK
CANAL CO.,
H. P. WILSON,

Vice-President.

[SEAL.]

NATIONAL SURETY COMPANY,
By W. E. EMMETT,
Resident Vice-President.

Attest:

E. M. MCCARTHY,
Resident Assistant Secretary.

Sealed and delivered in presence of
CHAS. MAASS.

Approved:

J. M. MORTON, JR.,
U. S. District Judge.

38

Citation on Appeal.

UNITED STATES OF AMERICA, ss:

The President of the United States to The T. A. Scott Company, Inc., a corporation organized and existing under the laws of the State of Connecticut, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the First Circuit, in the City of Boston, Massachusetts, on the twenty-fifth day of October next, pursuant to an appeal duly obtained from a decree of the District Court of the United States for the District of Massachusetts, wherein Boston, Cape Cod & New York Canal Company is appellant and you are appellee, to show cause, if any there be, why the said decree, entered against the said appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable James M. Morton, Jr., Judge of the District Court of the United States for the District of Massachusetts, this twenty-sixth day of September, in the year of our Lord one thousand nine hundred and eighteen.

JAMES M. MORTON, JR.,
United States District Judge.

Acknowledgment of Service on Citation.

October 11, 1918.

Due and sufficient service of the within citation is hereby accepted by The T. A. Scott Company, Incorporated.

By its Proctors,

PARK & MATTISON.

Clerk's Certificate.

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

I, James S. Allen, Clerk of the District Court of the United States for the District of Massachusetts, certify that the two volumes entitled as follows:

Libel.

[Filed January 10, 1917.]

To the Honorable James Madison Morton, Jr., Judge of the District Court of the United States within and for the District of Massachusetts:

The libel of the Boston, Cape Cod & New York Canal Company, incorporated under the laws of the Commonwealth of Massachusetts, against the White Oak Transportation Company, incorporated under the laws of the State of Maine, in a cause of damage, civil and maritime, alleges as follows:

1. The libellant was at the time hereinafter mentioned and is a corporation organized under the laws of Massachusetts and pursuant to such laws had constructed, and was maintaining and managing and using, a navigable tide-water ship canal for the passage of vessels and water craft of all kinds for tolls between Buzzard's Bay and Cape Cod Bay in the said District of Massachusetts.

2. The White Oak Transportation Company, the defendant, at the times herein referred to was a corporation duly organized under the laws of the State of Maine and having a usual place of business in Boston in the District of Massachusetts, the business of which comprised the managing and running of freight-carrying vessels and steamers.

3. One of the steamers owned by and employed in the business of the defendant on December 13, 1916, was the Bay Port.

4. On December 13, 1916, the defendant applied at the Buzzard's Bay entrance of the said canal for passage for the said steamer Bay Port with a cargo of about 2,393 tons of coal, which steamer was officered and manned by employees of the defendant who in all matters herein referred to acted as the agents and servants of the defendant.

5. The said application for passage by the defendant was a representation that the Bay Port was in all respects seaworthy and in a fit condition to navigate the said canal.

6. At the time of applying for passage through the canal as aforesaid the Bay Port was not in a fit condition to navigate the said canal in that she was difficult to control and steer, and apt to become unmanageable and fail to answer her helm.

7. The unfit condition of the Bay Port for navigating the said canal was known to, or should have been known to, the defendant or the defendant's agents.

8. The libellant did not know and had no means of knowing of the unfit condition of the Bay Port for navigating the said canal.

9. Before the Bay Port was permitted by the libellant to enter the canal the defendant, by its agent, H. W. Hammett, captain of
43 the Bay Port, signed an agreement with the libellant to conform to the laws of the United States and the Commonwealth of Massachusetts pertaining to marine navigation, and to all the rules and regulations of the Boston, Cape Cod & New York Canal Company governing the use of the said canal.

10. In response to the application and agreement of the defendant as aforesaid the libellant for tolls on that behalf gave the Bay Port permission to navigate the said canal, and shortly after noon on December 13, 1916, the Bay Port proceeded into the canal under the charge of George G. Rochester of the Cape Pilot Association, a pilot licensed by the United States Government, and assisted by the tug Dalzelline of the Cape Towing Corporation, a corporation organized under the laws of the State of Delaware, which was out ahead with a hawser on the Bay Port's bow. When the Bay Port reached a point a short distance west of Bourneedale, she suddenly became unmanageable and took sheer to starboard. All proper steps were taken to check the sheer and to enable her to recover her course, but nevertheless the Bay Port struck the south bank, and stove one small hole in her starboard side forward of midships. The tugs John C. Stuart and Hazelton responded to a call for assistance, and an attempt to get syphons into the Bay Port failed owing to the absence of manholes or small hatches into which the syphons might be introduced. The Bay Port remained with her bilge resting on the south bank at the point at which she struck.

11. Early that evening Captain Joseph Lewis of The T. A. Scott Company, Inc., took charge of the Bay Port on behalf of the defendant, with the object of floating and removing her from the canal, and the tugs Dalzelline, John C. Stuart and Hazelton of the Cape Towing Corporation, which had remained by the Bay Port, together with their crews, became subject to his orders.

12. Early on the following morning, December 14, 1916, the Bay Port was examined by a diver under the orders of Captain Joseph Lewis acting on behalf of the defendants, and the hole in its starboard side plugged up, and the leak checked.

13. Later on the same morning, while the Bay Port was
44 still in the charge of Captain Joseph Lewis on behalf of the defendant, the said steamer moved off the bank, to which by reason of the negligence of the defendant and its servants she had not been made fast. At that time the tugs Dalzelline, John C. Stuart and Hazelton were still by the Bay Port subject to Captain Joseph Lewis's orders, but owing to the negligence of the defendant and its servants the bows of the said tugs were turned toward the west and their engines not running. Captain Joseph Lewis at that time was on the lighter Salvor of The T. A. Scott Company, Inc., which by his orders had been brought alongside the Bay Port, and was engaged in superintending the rigging of coal buckets by the defendant's agents

on the *Salvor* to remove the *Bay Port's* cargo. Owing to the failure of the defendant through its agents and servants to take proper precautions to hold the *Bay Port* by the bank or to make suitable preparations to conduct the *Bay Port* through the canal, the said steamer began to float eastward with the tide. In the emergency William Lewis of the Cape Pilot Association, a pilot licensed by the United States Government, stepped from the *Hazelton* on board the *Bay Port*. Under pilot William Lewis's orders the captain of the *Bay Port* started his engines and with a hard-a-port wheel straightened out the *Bay Port*, which was drifting broadside and toward the north bank. The *Dalzelline* very quickly got a hawser on her bow, and after she had moved about half a mile the *Hazelton* caught up with her just as she sheered to port. Proper orders were given to check the sheer, but the *Bay Port* struck on the north bank. Her stern swung to the south bank and her bow away from the north bank, and she then sank diagonally across the canal with her stern on the south bank.

14. By the striking of the said *Bay Port* against the banks of the canal and by her sinking as aforesaid the canal has sustained severe damage.

15. In her sunken location the *Bay Port* obstructed one-half of the canal channel and constituted such a serious blockade of the canal as to close the same to navigation, and thenceforth continued and still continues to obstruct the said canal and close it to navigation.

16. The libellant gave the defendant repeated notices to remove the wreck, but defendant has failed to do so, and the *Bay Port* still remains an obstruction to traffic in the said canal.

17. As a result of the defendant's failure to remove the wreck from the canal channel the libellant has been obliged to contract on its own credit for the removal of the *Bay Port*.

18. Owing to the obstruction a large number of ships of all kinds have been prevented from using the said canal and will continue to be so prevented so long as the obstruction continues, whereby the libellant has lost and will continue to lose a large amount of tolls and charges.

19. Owing to the negligence of the defendant as aforesaid in causing physical damage to the libellant's canal by disturbing the rip-rap on the banks, in obstructing the navigation of the said canal, and in putting the libellant to the expense of removing the wreck and restoring the said canal to its normal condition for the passage of traffic, the libellant has sustained heavy loss and been put to great expense and will be put to greater expense and will sustain heavy loss, all to the damage of the libellant in the estimated sum of \$60,000.

20. The striking of the *Bay Port* against the bank on December 13 and her sliding off the bank, striking against the banks, and

sinking and blocking the canal on December 14, were in no way caused by the fault of the libellant, but were wholly and entirely caused by the negligence of the defendant and its agents.

(a) In that the defendant caused the said steamer to proceed into the canal when she was very difficult to steer and control, and apt to become unmanageable and fail to answer her helm, which fact was known to the defendant, its officers and agents, or which reasonably should have been known to it and them;

(b) In that the defendant attempted to navigate the canal with a steamer which was very difficult to steer and control, and apt to become unmanageable and fail to answer her helm, which fact was known to the defendant, its officers and agents, or which reasonably should have been known to it and them;

46 (c) In that the defendant attempted to navigate the canal with a steamer which was difficult to steer and control, and which was not provided with manholes or small hatches on the deck into which syphons might be introduced in case of emergency;

(d) In that the defendant through its agents negligently cared for the Bay Port while she was resting on the bank subsequent to the accident of December 13, and negligently suffered the said steamer to slide off the bank at a time when the defendant was at fault in not being prepared to complete the navigation of the canal by the Bay Port, as a result of which she sank in the channel;

(e) In that the defendant through its agents, subsequent to the accident of December 13, negligently permitted the Bay Port to become afloat in the said canal in an unsafe condition for navigation, and negligently failed to be prepared to complete the passage through the canal by the Bay Port, as a result of which she sank in the channel;

(f) In that the defendant, although repeatedly requested to do so by libellant, did not remove the said steamer from its sunken position in the canal, but allowed her to remain to be removed by the libellant;

(g) And in other respects, as will appear at the trial.

21. That all and singular the premises are true and within the admiralty and maritime jurisdiction of this Honorable Court.

Wherefore the libellant prays that process in due form of law according to the practice of this Honorable Court may issue against the said defendant, White Oak Transportation Company, and that it be ordered to appear before this court on such day as the court may direct, and to answer under oath the interrogatories here subjoined, and that if the said company cannot be found, then the goods and chattels thereof within the jurisdiction of this court may be attached to an amount sufficient to answer the libellant's claim, or if such property cannot be found that the credits and effects thereof may be attached in the hands of the Globe & Rutgers Fire Insurance Company, a corporation organized under the laws of the State of New York, the Glen Falls Insurance Company, a corpora-

tion organized under the laws of the State of New York, the National Fire Insurance Company, a corporation organized under the laws of the State of Connecticut, the Boston Insurance Company, a corporation organized under the laws of the Commonwealth of Massachusetts, garnishees, and that this Honorable Court will be pleased to decree to the libellant the payment of its damages sustained as aforesaid, and that the defendant be condemned to pay the same with interest thereon and the costs of this suit, and that the libellant may have such other and further relief as it may be entitled to receive.

AUGUST BELMONT,

President,

For the Boston, Cape Cod & New York Canal Company.

UNITED STATES OF AMERICA,

Southern District of New York,

County of New York, ss:

January 8, 1917.

Personally appeared August Belmont and made oath that he is the president of the Boston, Cape Cod & New York Canal Company, that he has read the foregoing libel, that he has made investigation of the matters therein referred to, and what is alleged and stated therein is true to the best of his knowledge and belief.

Before me,

[SEAL.]

HARRY J. DIETRICH,

Notary Public.

STOREY, THORNDIKE, PALMER & DODGE,

Proctors for the Libellant.

On the said tenth day of January, A. D. 1917, the following Interrogatories were propounded by the libellant to the defendant:

Interrogatories Propounded by the Libellant to the Defendant, White Oak Transportation Company.

[Filed January 10, 1917.]

1. Under the laws of what State was the defendant, White Oak Transportation Company, organized and where is its principal place of business?

2. Of what does the business of the defendant consist?

3. Who were the president, directors and other officers of the defendant on December 13, 1916, and during the period of one year previous to that time?

4. Are there employees of the defendant whose duties are of superintendence and management?

5. If the answer to Interrogatory 4 is in the affirmative, state who such employees were on December 13, 1916, and during the period of one year previous to that time.

6. Are there employees of defendant known as port captains?

7. If the answer to Interrogatory 6 is in the affirmative, state who were such port captains on December 13, 1916, and during the period of one year previous to that time where they were located, and what were their duties.

8. Was the defendant on December 13, 1916, and at the time referred to in the libel the owner of the steamer Bay Port?

9. What were the general dimensions of the steamer Bay Port, including length, beam, depth, gross tons, net tons, cargo capacity and bunker capacity?

10. Of what was the said steamer built, and how long had it been in use?

11. How long had the said steamer been owned by the defendant?

12. What services had it been engaged in?

13. Previous to December 13, 1916, had there been any accident to the said steamer either during navigation or otherwise, or had any accident occurred in which said steamer had a part?

14. If the answer to Interrogatory 13 is in the affirmative, state the date and nature of each such accident and the place where the same occurred, and describe such accident in detail.

15. During the year previous to December 13, 1916, had there been any accident to the said steamer, either during navigation or otherwise, or had any accident occurred in which said steamer had a part?

16. If the answer to Interrogatory 15 is in the affirmative, state the date and nature of each such accident and the place where the same occurred, and describe each such accident in detail.

17. Who was the captain of the said steamer on December 13, 1916?

49 18. What was his nautical experience and how long had he been in command of such steamer?

19. Had the said captain made any trips with the Bay Port prior to that which the Bay Port was making on December 13, 1916?

20. If the answer to Interrogatory 19 is in the affirmative as to each such trip, state between what ports each trip was made, with what cargo, and the dates of the same.

21. What other officers were on the Bay Port on December 13, 1916? Please give the name of each.

22. Had the officers mentioned in answer to Interrogatory 21 made any trips with the Bay Port prior to that which the Bay Port was making on December 13, 1916?

23. If the answer to Interrogatory 22 is in the affirmative as to each such officer, state between what ports each trip was made, with what cargo, the dates of each trip, and the capacity in which each such officer made each such trip.

24. Did the defendant through its captain or other agents on December 13, 1916, apply for passage for the said steamer at the Buzzard's Bay entrance to the Cape Cod Canal?

25. If the answer to Interrogatory 24 is in the affirmative, was the captain in command of the said vessel at the time of the said application for passage?

26. If the answer to Interrogatory 25 is in the negative, state who was in command of the said vessel at the time of the said application for passage.

27. Of what did the cargo of the said steamer consist at the time of the said application and what was the quantity thereof?

28. Who was the owner of the said cargo?

29. How much was due for freight for the said cargo?

30. How much water was the said steamer drawing at the time of the said application?

31. Had the said steamer ever passed through the Cape Cod Canal before?

32. If the answer to Interrogatory 31 is in the affirmative, state when the steamer did pass through the Cape Cod Canal, in which direction, and with what and how heavy a cargo.

50 33. If the answer to Interrogatory 31 is in the affirmative, who was in command of the said steamer on such previous occasion or occasions?

34. If the answer to Interrogatory 31 is in the affirmative, state who was quartermaster, who was helmsman, and name any other employees of the defendant who aided in steering the said steamer on such previous occasion or occasions.

35. Had the captain of the Bay Port mentioned in Interrogatory 17 ever been through the Cape Cod Canal on previous occasions with the Bay Port or with any other vessel?

36. If the answer to Interrogatory 35 is in the affirmative, state when, on what vessel or vessels, the kind of vessels, and in which direction.

37. If the answer to Interrogatory 25 is in the negative, state whether the officer mentioned in the answer to Interrogatory 26 had ever been through the Cape Cod Canal on previous occasions in charge of the Bay Port or in charge of any other vessel.

38. If the answer to Interrogatory 37 is in the affirmative, state when, on what vessel or vessels, the kinds of vessels, and in which direction.

39. At the time of the application for passage through the canal on December 13, 1916, what was the number of officers and crew of the Bay Port?

40. At the time of the said application where were the said officers and crew stationed for the purpose of passing through the said canal?

41. Did the Bay Port enter the Cape Cod Canal on December 13, 1916, at the Buzzard's Bay entrance?

42. If the answer to Interrogatory 41 is in the affirmative, state at what hour the said vessel entered the canal.

43. Did the said steamer, after entering the canal as aforesaid, proceed through the canal to a point a short distance west of Bourne-dale?

44. Did the said steamer strike the bank of the canal at a point a short distance west of Bourne-dale?

45. Who was at the helm of the said vessel at the time referred to in Interrogatory 44?

51 46. What was his nautical experience?

47. On how many occasions had he served as helmsman for the Bay Port?

48. Had the said helmsman ever been through the Cape Cod Canal before as helmsman?

49. If the answer to Interrogatory 48 is in the affirmative, state when, on what vessel or vessels, the kinds of vessels and in which direction.

50. Was there a quartermaster on the said steamer at the time referred to in Interrogatory 44 and where was he stationed?

51. Name any other employees of the defendant who took an active part in steering the said steamer in the canal, and state in what capacity each took part.

52. What was the nautical experience of each such employee?

53. Had anyone named in the answer to Interrogatory 51 ever taken part in steering a vessel in the Cape Cod Canal before?

54. If the answer to Interrogatory 53 is in the affirmative, state when, in what capacity, on what vessel or vessels, the kinds of vessels, and in which direction.

55. How fast was the said Bay Port moving at the time referred to in Interrogatory 44?

56. Describe in detail the steering apparatus of the said steamer and explain its operation.

57. Previous to December 13, 1916, during the ownership of the said steamer by defendant state whether any difficulty had been experienced with the said rudder and steering appliances.

58. If the answer to Interrogatory 57 is in the affirmative, state what difficulties there have been, with dates and the location of the steamer at the times.

59. During the year previous to December 13, 1916, state whether any difficulty had been experienced with the said rudder and steering appliances.

60. If the answer to Interrogatory 59 is in the affirmative, state what difficulties there have been, with dates and the location of the steamer at the times.

52 61. How long had the said rudder and steering appliances been in use on the said steamer?

62. Had any repairs ever been made on the said rudder or steering appliances?

63. If the answer to Interrogatory 62 is in the affirmative, state what the repairs were, when they were made and who made them.

64. Had defendant, previously to December 13, 1916, made provision that inspections be held to ascertain the seaworthiness of the said steamer?

65. If the answer to Interrogatory 64 is in the affirmative, state what the said provisions were and who made them on behalf of the defendant.

66. If the answer to Interrogatory 64 is in the affirmative, were inspections actually held in accordance with such provisions?

67. On what dates did defendant cause the said steamer to be

inspected, by whom was she inspected in each instance, and where was each inspection made?

68. State as to each of the above-mentioned inspections whether the results thereof were known to the defendant's president or to its directors or any of them.

69. State as to each such inspection what other officer, manager, superintendent, or port captain of defendant knew of the results thereof, and state the names of such other officers, managers, superintendents, or port captains.

70. Were inspections made of the said steamer during the ownership of the defendant otherwise than as stated in the answers to the foregoing interrogatories?

71. If the answer to Interrogatory 70 is in the affirmative, when and where were such inspections made and by whom?

72. Were inspections of the said steamer made during the year prior to December 13, 1916, otherwise than as stated in the answer to the foregoing interrogatories?

73. If the answer to Interrogatory 72 is in the affirmative, when and where were such inspections made and by whom?

74. State as to each of the inspections mentioned in the answers to Interrogatories 70 and 72 whether the results thereof were known to the defendant's president or its directors or any of them.

75. State as to each inspection mentioned in the answers to Interrogatories 70 and 72 what other officer, manager, superintendent, or port captain of defendant knew of the results thereof, and state the names of such other officers, managers, superintendents, or port captains.

76. Has defendant in its possession or control records of the inspections referred to in Interrogatories 64, 70 and 72?

77. If the answer to Interrogatory 76 is in the affirmative, specify each inspection a record whereof is in defendant's possession or control, and annex a copy of each such record, or appoint a time and place where the said records may be inspected by libellant or its proctors.

78. Did defendant's president or directors, or any of them, ever see the records referred to in Interrogatory 77, or any other records of inspection of the said steamer?

79. If in the answer to Interrogatory 78 it is stated that any records were seen which are not now in defendant's possession or control, state in detail the contents of such records, what has become of the same and where they now are.

80. If the answer to Interrogatory 78 is in the affirmative, specify in detail what records the defendant's president or directors saw, and when and where they saw them.

81. Did any other officer, manager, superintendent, or port captain ever see the records referred to in Interrogatory 77, or any other records of inspection of the said steamer?

82. If in the answer to Interrogatory 81 it is stated that any records were seen which are not now in defendant's possession, or

control, state in detail the contents of such records, what has become of the same, and where they now are.

83. If the answer to Interrogatory 82 is in the affirmative, specify in detail what records such other officers, managers, superintendents, or port captains saw, and when and where they saw them.

84. Were any inspections made of the said steamer of which no written record was made?

54 85. If the answer to Interrogatory 84 is in the affirmative, state what such inspections were, when, where and by whom they were made, and what was found as a result of each such inspection.

86. If the answer to Interrogatory 84 is in the affirmative, state as to each such inspection whether the result was known to the defendant's president, directors, or other officers, managers, superintendents, or port captains. Please specify what inspections were known to each.

87. Did defendant's president go on board or see the said steamer during the year prior to December 13, 1916; and, if so, at what times?

88. If during the year prior to December 13, 1916, defendant's president saw the said steamer without going on board, specify in detail where he saw her, under what circumstances, and what observations he made.

89. If the answer to Interrogatory 88 is in the negative, what was the last time defendant's president saw or went on board the said steamer?

90. Did the president, during the year prior to December 13, 1916, observe the rudder or steering appliances of the said steamer, or the manner in which the said steamer answered her helm?

91. Did defendant's directors or any of them go on board or see the said steamer during the year prior to December 13, 1916; and, if so, at what time?

92. If, during the year prior to December 13, 1916, defendant's directors or any of them saw the said steamer without going on board, specify in detail where he saw her, under what circumstances, and what observations he made.

93. If the answer to Interrogatory 91 is in the negative, what was the last time the defendant's directors saw or went on board said steamer? Please answer as to each.

94. Did defendant's directors or any of them during the year prior to December 13, 1916, observe the rudder or steering appliances of the said steamer, or the manner in which the said steamer answered her helm?

55 95. Did any other officer, manager, superintendent or port captain of defendant, during the year prior to December 13, 1916, observe the rudder or steering appliances of the said steamer, or the manner in which the said steamer answered her helm?

96. If, during the year prior to December 13, 1916, any officer, manager, superintendent or port captain of defendant saw the said

steamer without going on board, specify in detail where he saw her, under what circumstances, and what observations be made.

97. If the answer to Interrogatory 95 is in the negative, what was the last time any other officer, manager, superintendent or port captain of defendant saw or went on board the said steamer?

98. Did any other officer, manager, superintendent or port captain of defendant, during the year prior to December 13, 1916, observe the rudder or steering appliances of the said steamer, or the manner in which the said steamer answered her helm?

99. What voyage was the Bay Port making on December 13, 1916, when and from what port did she leave, and what was her destination?

100. At what port did the Bay Port last touch before applying for admission to the said canal on December 13, 1916?

101. What officer, manager, superintendent or port captain of the defendant saw the vessel in the port referred to in Interrogatory 100, and under what circumstances?

102. What was the last occasion before the said vessel started on the voyage referred to in Interrogatory 99 when she was seen by any officer or agent of defendant? State in detail under what circumstances, by whom she was seen, and where.

103. If the answer to Interrogatory 44 is in the affirmative, did the Bay Port remain with her bilge resting on the bank at that point?

104. If the answer to Interrogatory 103 is in the affirmative, what was done by the captain, officers or crew of the Bay Port to keep the said steamer on the bank?

105. What agreement was made by the defendant with The T. A. Scott Company, Inc., whereby Captain Joseph Lewis went to the position of the Bay Port in the canal on the evening of December 13, 1916? If the agreement was in writing, annex a copy thereof; if oral, state the substance thereof.

106. As a result of what acts of the defendant's officers or agents did Captain Joseph Lewis of The T. A. Scott Company, Inc., go to the position of the Bay Port in the canal on the evening of December 13, 1916?

107. Where were the captain, officers and crew of the Bay Port after said steamer struck on the bank on December 13, 1916?

108. Where were the captain, officers and crew of the Bay Port during the night of December 13, 1916?

109. Did the Bay Port move off the bank on the morning of December 14, 1916?

110. If the answer to Interrogatory 109 is in the affirmative, where were the captain, officers and crew at that time?

111. In what company or companies was the Bay Port insured?

112. To what extent was the vessel insured in each company mentioned in the answer to Interrogatory 111?

113. Did the Bay Port sink in Cape Cod Canal on December 14, 1916; and, if so, at what point?

114. Has the Bay Port remained sunk in the Cape Cod Canal since December 14, 1916?

STOREY, THORNDIKE, PALMER &
DODGE,
*Proctors for the Boston, Cape Cod &
New York Canal Company.*

At the same term, the following Answers were filed:

Answer of Boston Insurance Company, Garnishee.

[Filed February 7, 1917.]

And now comes the Boston Insurance Company, summoned as garnishee of the principal defendant in the above-entitled cause, and appears by Henry R. Hedge, its vice-president, who for answer says that at the time of the service of the libellant's writ upon it, it had no goods, effects or credits of said White Oak Transportation Company in its possession or control.

BOSTON INSURANCE COMPANY,
By HENRY R. HEDGE,
Vice-President.

57 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Boston, February 3, 1917.

Then personally appeared the above-named Henry R. Hedge, vice-president of Boston Insurance Company, and made oath that the above answer by him subscribed is true to the best of his knowledge, information and belief, before me,

FREDERICK W. EATON,
Justice of the Peace.

Answer of Globe & Rutgers Fire Insurance Company, Garnishee.

[Filed February 7, 1917.]

And now comes the Globe & Rutgers Fire Insurance Company, summoned as garnishee of the principal defendant in the above-entitled cause, and appears by W. H. Pauleson, its secretary, who for answer says that at the time of the service of the libellant's writ upon it, it had no goods, effects or credits of said White Oak Transportation Company in its possession or control.

W. H. PAULESON,
Secretary.

STATE OF NEW YORK,
County of New York, To wit:

Then personally appeared the above-named W. H. Pauleson, secretary of Globe & Rutgers Fire Insurance Company, and made oath that the above answer by him subscribed is true to the best of his knowledge, information and belief, before me.

[SEAL.]

WILLIAM L. LINDSAY,
Notary Public.

Answer of National Fire Insurance Company, Garnishee.

[Filed February 7, 1917.]

And now comes the National Fire Insurance Company, a corporation duly organized and existing by law, summoned as garnishee in the above-entitled action, and appears by H. A. Smith, its president, who for answer says that at the time of the service of the libellant's writ upon it, said company had no goods, effects or
58 credits of the respondent, White Oak Transportation Company, in its possession or control.

H. A. SMITH.

STATE OF CONNECTICUT,
County of Hartford, ss:

Hartford, February 5, 1917.

Then personally appeared the above-named H. A. Smith, president of National Fire Insurance Company, and on oath declared the foregoing answer to be true to the best of his knowledge, information and belief, before me,

[SEAL.]

H. L. HILTON,
Notary Public.

Answer of Glens Falls Insurance Company, Garnishee.

[Filed February 7, 1917.]

And now comes the Glens Falls Insurance Company, summoned as garnishee of the principal defendant in the above-entitled cause, and appears by E. W. West, its vice-president, who for answer says that at the time of the service of the libellant's writ upon it, it had no goods, effects or credits of said White Oak Transportation Company in its possession or control.

E. W. WEST,
Vice-President.

STATE OF NEW YORK,

County of Warren. To wit:

February 6, 1917.

Then personally appeared the above-named E. W. West, vice-president of Glens Falls Insurance Company, and made oath that the above answer by him subscribed is true to the best of his knowledge, information and belief, before me,

[SEAL.]

N. R. GOURLEY,
Notary Public.

This cause was thence continued to the March Term, A. D. 1917, when, to wit, May 17, 1917, the following Answer and Exceptions were filed:

59 *Answer of White Oak Transportation Company, Answer to Libellant's Interrogatories, and Interrogatories Propounded by Respondent.*

[Filed May 17, 1917.]

To the Honorable James M. Morton, Jr., Judge of the District Court of the United States within and for the District of Massachusetts:

The answer of the White Oak Transportation Company, a corporation duly organized and existing under the laws of the State of Maine, to the libel of Boston, Cape Cod & New York Canal Company alleges and articulately propounds as follows:

First. As to the allegations contained in the first article of said libel, the respondent admits the same.

Second. As to the allegations contained in the second article of said libel, the respondent admits the same.

Third. As to the allegations contained in the third article of said libel, the respondent admits the same.

Fourth. As to the allegations contained in the fourth article of said libel, the respondent admits that said steamer applied for entrance to said canal on said date and carried a cargo of 2,393 tons of coal, and that said steamer was officered and manned by employees of the respondent; as to the remaining allegation in said article the respondent denies the same.

Fifth. As the allegations contained in the fifth article of said libel state a conclusion of law, the respondent therefore does not answer the same.

Sixth. As to the allegations contained in the sixth article of said libel, the respondent denies the same.

Seventh. As to the allegations contained in the seventh article of said libel, the respondent respectfully refers the libellant to its answer to the allegations in article 6 of said libel.

Eighth. As to the allegations contained in the eighth article of said libel, the respondent respectfully refers the libellant to its answer to the allegations in article 6 of said libel.

Ninth. As to the allegations contained in the ninth article of said libel, the respondent is ignorant and can neither admit nor deny the same, but leaves the libellant to its proof, if material.

Tenth. As to the allegations contained in the tenth article of said libel, the respondent admits that the libellant admitted said steamer Bay Port to navigate said canal and that said vessel started shortly after noon on December 13, 1916, to pass through the same under the charge of pilot Rochester and assisted by the tug Dalzelline, the latter having a short hawser from the bow of said steamer Bay Port, and that said steamer Bay Port, a short distance west of Bournedale, took a sheer to starboard and struck the south bank, and among other damages stove a hole in her starboard side forward of amidships, and that the tugs John C. Stuart and Hazelton responded to a call for assistance, and that said steamer Bay Port remained with her bilge resting on the south bank at the point at which she struck. It is without knowledge of the relation of pilot Rochester to the Cape Pilot Association and between the tug Dalzelline and the Cape Towing Corporation, and as to the attempt to get siphons into the Bay Port and the results thereof, and can neither admit nor deny the same, but leaves the libellant to its proof thereof, if material; the respondent denies the remaining allegations in said tenth article.

Eleventh. As to the allegations contained in the eleventh article of said libel, the respondent denies the same.

Twelfth. As to the allegations contained in the twelfth article of said libel, the respondent denies the same.

Thirteenth. As to the allegations contained in the thirteenth article of said libel, the respondent admits that said steamer Bay Port moved off the bank and that at said time the tugs Dalzelline, John C. Stuart and Hazelton were standing by the Bay Port; that Captain Lewis at said time was on the lighter Salvor, engaged in superintending the rigging of coal buckets for the purpose of jettisoning the cargo of said steamer Bay Port, and that said steamer began to float eastward with the tide; that pilot William Lewis took charge of said steamer Bay Port and that under his direction the engines of the latter were started, and that said steamer Bay Port, under tow of the tug Dalzelline, with a short hawser off the bow of the Bay Port, continued through the canal; that she later sheered to port, striking the north bank, her stern swinging to the south bank, knocking her bow off the north bank,

and that she sank diagonally part way across the canal, with her stern on the south bank. The respondent denies the remaining allegations in said thirteenth article.

Fourteenth. As to the allegations contained in the fourteenth article of said libel, the respondent denies the same.

Fifteenth. As to the allegations contained in the fifteenth article of said libel, the respondent denies the same.

Sixteenth. As to the allegations contained in the sixteenth article of said libel, the respondent admits that the libellant notified it to remove said wreck and that said wreck has not been removed by the respondent, and alleges as a reason for not removing said wreck that said steamer, through no fault or negligence of the respondent or of those in charge of said steamer, but by reason of the negligence of the libellant, its servants and agents, became a total loss, and therefore respondent was under no obligation to remove said wreck.

Seventeenth. As to the allegations contained in the seventeenth article of said libel, the respondent is without knowledge, and can neither admit nor deny the same, but leaves the libellant to its proof thereof, if material.

Eighteenth. As to the allegations contained in the eighteenth article of said libel, the respondent denies the same.

Nineteenth. As to the allegations contained in the nineteenth article of said libel, the respondent denies the same.

Twentieth. As to the allegations contained in the twentieth article of said libel, the respondent denies the same.

Twenty-first. As to the allegations contained in the twenty-first article of said libel, the respondent denies that all and singular the premises are true, but admits the admiralty and maritime jurisdiction of this Honorable Court.

Twenty-second. And, further answering, the respondent says that the true facts with reference to said matters set out in said libel are as follows:

62 That, prior to and including the date of the accidents hereinafter referred to, the libellant represented said canal to be in a fit, safe and proper condition, suitable for the passage of self-propelled vessels, both loaded and light, of the type and draft of said steamer Bay Port, and to have a depth at mean low water of 25 feet, and solicited, prior to and including said times, said vessels to pass through said canal, in consideration of tolls prescribed by the libellant, and offered to maintain and furnish to said vessels proper tug assistance and pilotage.

Pursuant to the aforesaid representation, solicitation and offer of the libellant, and in reliance on the same, the respondent, at about noon of December 13, 1916, applied for passage through said canal for its steamer Bay Port, including the services of libellant's

pilot and proper tug assistance by libellant. At said time said steamer was off Wing's Neck, Buzzard's Bay, loaded with about twenty-three hundred ninety-three (2,393) tons of coal, was drawing 18 feet 2 inches of water, and was on a voyage from Newport News, in the District of Virginia, to Weymouth, in the District of Massachusetts. In response to said application the tug Dalzalline, which was in libellant's employ and the officers and crew of which were agents or servants of the libellant, proceeded to said steamer Bay Port with pilot George C. Rochester, a servant or agent of the libellant. Upon arriving at said steamer, said pilot Rochester went on board of her, took command and so remained until and including the happening of the accident hereinafter described. Said tug proceeded ahead of said steamer with a short hawser leading to the latter's bow, and under the directions of said pilot the Bay Port assisted said tug with her engines. In the aforesaid manner said steamer entered said canal and proceeded against a strong head tide towards the Cape Cod Bay entrance thereof under the charge of said pilot.

When said steamer had proceeded part way through said canal, and while she was steered in accordance with the instructions of said pilot, she sheered to starboard and struck the south bank of said canal to the eastward of Bourne Highway Bridge at about 2.15 p. m.

63 As soon as said steamer struck said bank, distress signals were blown, and in response thereto the tugs Hazleton and John C. Stuart came to the assistance of said steamer and, together with said tug Dalzalline, endeavored to free said steamer from said bank, but said steamer remained fast aground until the following day. Although said steamer kept her pumps going continuously, she partly filled, and as she was resting in a dangerous position on the sloping bank of said canal, T. A. Scott Company, Inc., a wrecking corporation, was at once engaged by the respondent to float said steamer.

Early on the morning of the December 14, 1916, an examination was made by a diver, and a hole and a crack in said steamer's bottom plating were plugged. Thereafter the steamer's pumps gained on the water in the hold and at about 10.15 a. m. of said date, or about four and a half hours before high water, said steamer suddenly left the bottom and commenced to drift to the eastward with the tide. Pilot William Lewis, a servant or agent of the libellant, thereupon proceeded to complete the passage through the canal which had been interrupted by the stranding above mentioned. Said tug Dalzalline ran a short hawser from the bow of said steamer and took her in tow, assisted by the engines of the steamer, which were started under the directions of said pilot William Lewis.

After proceeding about a mile and a half to the eastward, and while she was steered in accordance with the instructions of said pilot, said steamer sheered to port and struck the northern bank of said canal. Her stern then swung until it struck the southerly bank, which released her bow from the northerly bank, and said steamer then drifted on for one or two lengths until her stern took

bottom near the southerly bank. During all of the aforesaid times, said steamer Bay Port was under the charge of said pilots Rochester and William Lewis, or one of them, and of said tug or tugs under the direction of said pilot or pilots, and all orders given by said pilots or either of them were promptly executed by the master, officers and crew of said steamer Bay Port.

64 Twenty-third. Any loss to said libellant rising out of the aforesaid accidents and the damage and loss of said steamer Bay Port and her cargo were caused solely by the negligence of the libellant, its servants and agents in the following respects, among others:

1. In representing said canal to be safe for passage by vessels of the type and draft of said steamer Bay Port, when it was not safe.

2. In representing that there were 25 feet of water at mean low water in the channel of said canal, when there was not that depth.

3. In permitting said canal to remain in an unsafe, dangerous and unfit condition by reason of the presence of shoals and/or rocks and/or other obstructions, which condition was known to the libellant or which, by the exercise of reasonable diligence, it could have ascertained.

4. In allowing said steamer Bay Port to navigate said canal when the latter was in places too shallow and/or rocky to permit safely said navigation.

5. In failing to dredge said canal when the libellant knew, or should have known, of shoalings therein.

6. In allowing vessels of great draft to pass through said canal at high speed, causing the sand to be drawn out from under the rip-rap into the canal and with the swift tidal currents make up shoals, which fact was well known to the libellant, and by reason of which the said steamer Bay Port could not control her movements.

7. In negligently permitting a so-called "knuckle" to exist making off the north bank of said canal near the point where the first grounding occurred, causing a swirl which rendered navigation at said place dangerous and caused said steamer Bay Port to sheer.

8. In negligently permitting a shoal to exist in the channel of said canal near the point where the second grounding occurred, in consequence whereof said steamer sheered.

9. In negligently failing to provide said canal with suitable dolphins or other means of making vessels fast.

10. In negligently piloting, directing and taking said steamer through said canal in the manner, at the time and under the conditions existing on each occasion of grounding.

65 11. In attempting to take said steamer Bay Port through said canal with an insufficient number of and improperly placed tugs.

12. In constructing, maintaining said canal with sloping banks faced with rip-rap, without proper means of protection for vessels passing through said canal.

13. In negligently failing to mark, by buoys or other distinguishing marks, shoals, rocks or other obstructions in said canal.

14. And in other respects to be shown at the trial.

Twenty-four. Without waiving the foregoing answer, but insisting thereon and contesting its liability with respect to the matters alleged in said libel, the respondent, further answering, says that, if it should be held liable in whole or in part for any damages sustained by the libellant in the premises, then it hereby claims the benefit of its limitation of liability as owner of said steamer Bay Port, as provided for in the third and fourth sections of the Act of March 3, 1851, entitled "An Act Limiting the Liability of Ship Owners and for other purposes," and as provided for in all other and subsequent acts made and provided or in addition thereto; that at the time of said damage and loss there was no freight pending and that after said steamer sank as aforesaid in said canal she was without value and was abandoned to the libellant as a total loss and was by it blown up.

Twenty-fifth. All and singular the premises are true and within the admiralty and maritime jurisdiction of this Honorable Court.

Wherefore the respondent prays that the above libel may be dismissed with costs, or that, in case it should be decided that the respondent is liable in whole or in part for the damages referred to in said libel and in the aforesaid answer, the respondent may have the benefit of its limitation of liability as provided for in the acts referred to in the twenty-fourth article of this answer; and that the respondent be ordered to answer under oath the interrogatories hereto annexed.

WHITE OAK TRANSPORTATION
COMPANY.

By GEORGE HAWLEY,

President and General Manager.

BLODGETT, JONES, BURNHAM & BINGHAM,

Proctors for Respondent.

66 COMMONWEALTH OF MASSACHUSETTS,

Suffolk, ss:

Boston, May 17, 1917.

Personally appeared George Hawley, president and general manager of said White Oak Transportation Company, and made oath

that the statements in the foregoing answer subscribed by him are true to the best of his knowledge, information and belief.

Before me,

FOYE M. MURPHY,
Notary Public.

[SEAL.]

Answers to Interrogatories Propounded by the Libellant to the Respondent.

Ans. to Int. 1. Maine; Boston, Mass.

Ans. to Int. 2. Operation of freight-carrying steamships.

Ans. to Int. 3. George Hawley, president; Phineas W. Sprague, vice-president; George W. Bunton, secretary and treasurer; directors: George Hawley, Phineas W. Sprague, Elizabeth S. Sprague, W. Joseph Tracy and Nathan F. Sears, on December 13, 1916; the officers during the year previous were the same, but the directors were: George Hawley, Phineas W. Sprague, William A. Paine, Junius Beebe, Henry N. Sweet, Addison C. Burnham, Edward E. Blodgett and James F. Shaw.

Ans. to Int. 4. Yes.

Ans. to Int. 5. George Hawley is general manager.

Ans. to Int. 6. Yes.

Ans. to Int. 7. Captain Albert L. Kent of Newport News, Virginia, and Captain William H. Harriman of Boston. These men were not strictly port captains, but had charge of all repair work made upon the boats of the company in port.

Ans. to Int. 8. Yes.

Ans. to Int. 9. Length, 265 feet; beam, 38 feet; depth, 24 feet; gross tons, 1,399; net tons, 1,075; cargo capacity, 2,400 tons; bunker capacity, 350 tons.

Ans. to Int. 10. Steel. The vessel was built in 1891, but has been repaired off and on since that time and had an entirely new bottom to the turn of the bilge less than a month before the time of her stranding in the canal.

67 Ans. to Int. 11. Since December 2, 1907.

Ans. to Int. 12. Coastwise coal carrying trade.

Ans. to Int. 15. Yes.

Ans. to Int. 16. The Greek steamer Miltiades Embiricos, in a strong wind, drifted down upon the steamer Bay Port on December 26, 1915, in Boston Harbor, causing damages to the upper works of said vessel, which were fully repaired prior to December, 1916.

Ans. to Int. 17. Hiram W. Hammett.

Ans. to Int. 18. He has been going to sea for forty-eight years, has been master of various vessels for about twenty-six years and had been in command of the steamer Bay Port since November 21, 1916.

Ans. to Int. 19. Yes.

Ans. to Int. 20. Light from Boston November 24, 1916, to Sewells Point, Virginia, arriving November 27, left November 29 for Providence, Rhode Island, with coal, arriving December 2; left for Newport News, Virginia, on December 4, arriving December 8; left for

Weymouth, Mass., December 10 with coal, arriving at entrance to canal December 13, 1916.

Ans. to Int. 21. First officer, Alexander M. Shelton; second officer, Fred N. Hart; third officer, Leroy Maker; chief engineer, William H. Gifford.

Ans. to Int. 22. Yes.

Ans. to Int. 23. Alexander M. Shelton, master of said vessel from May 15, 1915, to May 22, 1915, and first officer from November 21, 1916, to the time of the accident. Fred N. Hart, second officer from the middle of July, 1916, to the time of said accident. Leroy Maker, third officer from February 8, 1916, to date of accident. The vessel during these periods went south to coal ports light and came north to New England ports with coal.

Ans. to Int. 24. Yes.

Ans. to Int. 25. Yes.

Ans. to Int. 26. See answer to Interrogatory 25.

Ans. to Int. 27. 2,393 tons of coal.

Ans. to Int. 28. To the best of the respondent's information and belief, Northern Coal Company.

68 Ans. to Int. 29. No freight became due.

Ans. to Int. 30. Eighteen feet, two inches.

Ans. to Int. 31. Yes.

Ans. to Int. 32. Several times going south light. The dates are not now obtainable, but will be supplied later at the request of libellant.

Ans. to Int. 33. Captain Hammett during part of said time and Captain John W. Maker during the remainder of said time.

Ans. to Int. 34. The helmsman on each of said occasions was either the second or third officer.

Ans. to Int. 35. Yes.

Ans. to Int. 36. Going south light with the Bay Port on the last trip prior to December 13, 1916.

Ans. to Int. 37. See answer to Interrogatory 25.

Ans. to Int. 38. See answer to Interrogatory 37.

Ans. to Int. 39. Twenty-two all told.

Ans. to Int. 40. At the time said application was made said officers and crew had not taken any particular stations.

Ans. to Int. 41. Yes.

Ans. to Int. 42. 12.18 ship's time.

Ans. to Int. 43. Yes.

Ans. to Int. 44. Yes.

Ans. to Int. 45. The third officer.

Ans. to Int. 46. He was thirty years of age; had been going to sea for five years, two on sail vessels and three on steamers; had been on the Bay Port since February 8, 1916.

Ans. to Int. 47. On occasions too numerous to mention, and particularly where particular steering was necessary.

Ans. to Int. 48. Yes.

Ans. to Int. 49. Fourteen times on the steamer America in both directions, and once on the steamer Bay Port bound south.

Ans. to Int. 50. She did not carry a quartermaster as such; the third officer acted as helmsman.

Ans. to Int. 51. The second officer after the steamer Bay Port had left the position where she first grounded.

69 Ans. to Int. 52. The second officer had been going to sea forty years and had been master of various vessels for thirty-five years.

Ans. to Int. 53. Yes.

Ans. to Int. 54. The second officer three times previously going south on steamers; the dates are not now obtainable.

Ans. to Int. 55. Through the water about six knots; over the bottom about two or three knots.

Ans. to Int. 56. The steering apparatus is of the worm screw steam gear type operated from the pilot house by a steering wheel; wire ropes led in the usual manner to chains attached to the quadrant of the rudder head, the turning of which quadrant moved the rudder.

Ans. to Int. 57. None.

Ans. to Int. 58. See answer to Interrogatory 57.

Ans. to Int. 59. None.

Ans. to Int. 60. See answer to Interrogatory 59.

Ans. to Int. 61. The rudder and quadrant had been in the steamer since owned by respondent. The steering appliances had been overhauled at each annual inspection and also when the steamer was undergoing repairs about a month prior to this accident, and replacements made of wires and chains as needed.

Ans. to Int. 62. See answer to Interrogatory 61.

Ans. to Int. 63. See answer to Interrogatory 61.

Ans. to Int. 64. Yes.

Ans. to Int. 65. The Bay Port had been overhauled once each year. At that time the local inspectors of hulls and boilers had been notified, in order that they might have an opportunity of making an examination of the vessel.

Ans. to Int. 66. Yes.

Ans. to Int. 67. Besides the captains in charge of the repair work for respondent, the United States inspectors in February, 1915, in Boston; in March, 1916, in Providence; and when she underwent extensive repairs in September, October and November, 1916, in Boston.

70 Ans. to Int. 68. The conclusions of Government inspectors and the respondent's captains in charge of the repair work that she was seaworthy and in proper condition for carrying cargoes were known.

Ans. to Int. 69. This was known by all of them.

Ans. to Int. 70. None except generally and informally by the master, marine superintendent and his assistant.

Ans. to Int. 71. These general and informal inspections were made whenever the vessel would reach port.

Ans. to Int. 72. No.

Ans. to Int. 73. See answer to Interrogatory 72.

Ans. to Int. 74. It is impossible to state as to each inspection whether the results thereof were known to respondent's president or directors or any of them.

Ans. to Int. 75. They all knew to a great extent the results, though from time to time minor repairs were required and were made within the knowledge only of the master, the marine superintendent and or/his assistant.

Ans. to Int. 76. No.

Ans. to Int. 77. See answer to Interrogatory 76.

Ans. to Int. 78. No, although they knew that the vessel had been passed by the inspectors, and that the records were in the Government files.

Ans. to Int. 79. See answer to Interrogatory 78.

Ans. to Int. 80. See answer to Interrogatory 78.

Ans. to Int. 81. See answers to Interrogatories 76 and 77.

Ans. to Int. 82. See answer to Interrogatory 81.

Ans. to Int. 83. See answer to Interrogatory 82.

Ans. to Int. 84. General and informal inspections made by the master, marine superintendent and his assistant were not a matter of record.

Ans. to Int. 85. See answer to Interrogatory 84.

Ans. to Int. 86. It is impossible to state what results were known to the respondent's president, directors or other officers, managers or superintendents.

Ans. to Int. 87. Respondent's president went on board and saw said steamer several times during the year prior to December 13, 1916.

71 Ans. to Int. 88. He did not see her without later going or previously having gone aboard of her except in the drydock.

Ans. to Int. 89. Within a month prior to December 13, 1916.

Ans. to Int. 90. Not particularly.

Ans. to Int. 91. No, except the president, who was also a director.

Ans. to Int. 92. None of the directors saw her without later going or previously having gone aboard her except the president, as stated in answer to Interrogatory 88. He saw her in the repair yard while present to ascertain the progress of the work, and made general observations as to said progress.

Ans. to Int. 93. See answer to Interrogatory 91.

Ans. to Int. 94. None except the president. (See answer to Interrogatory 90.)

Ans. to Int. 95. Yes.

Ans. to Int. 96: They did not see her without later going or previously having gone aboard her except possibly working about her or while she was in the repair yard; particular observations as to the progress of the work were made.

Ans. to Int. 97. See answer to Interrogatory 95.

Ans. to Int. 98. See answer to Interrogatory 95.

Ans. to Int. 99. Left Newport News December 10, 1916, for Weymouth, Mass.

Ans. to Int. 100. Newport News.

Ans. to Int. 101. Captain Albert L. Kent, in the usual course of his duties.

Ans. to Int. 102. Just prior to the trip on which she met with the

accident in said canal, by the marine superintendent and his assistant and the master, officers and crew in their regular routine of duties.

Ans. to Int. 103. Yes.

Ans. to Int. 104. The master telephoned to Boston for assistance, resulting in a representative of an expert wrecking company appearing in a few hours after the grounding. The master also made soundings inside and round the vessel, kept steam up, and pumps were worked. The master and crew stood by all the time, and two tugs were alongside in case of an emergency.

72 Ans. to Int. 105. The agreement was oral to the effect that The T. A. Scott Company, Inc., should do what it could to save the vessel.

Ans. to Int. 106. At the request of the agent of the respondent by telephone to the agent of The T. A. Scott Company, Inc., in Boston.

Ans. to Int. 107. Immediately after said stranding, soundings were made inside and out of the vessel and the steam pumps were worked. The officers and crew remained on board until it was seen that the water was gaining on her; they then went aboard a tug alongside and stood by; the engineer's department remained by their engine room and kept steam up.

Ans. to Int. 108. They were up all night, standing by the Bay Port.

Ans. to Int. 109. Yes.

Ans. to Int. 110. They were all on board the Bay Port. The captain was on deck near the pilot house. The first officer was on deck. The second officer was in the galley near the pilot house. The third officer was on deck near the pilot house. The other members of the crew were about the ship, attending to their duties.

Ans. to Int. 113. Yes, the exact place and position are well known to libellant.

Ans. to Int. 114. Yes, until dynamited by the libellant.

WHITE OAK TRANSPORTATION
COMPANY,
By GEORGE HAWLEY,
President and General Manager.

BLODGETT, JONES, BURNHAM &
BINGHAM,
Proctors for Respondent.

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Boston, May 17, 1917.

Then personally appeared the above-named George Hawley, president and general manager of White Oak Transportation Company, and made oath that the foregoing answers to interrogatories
73 propounded to the respondent are true to the best of his knowledge, information and belief, before me.

[SEAL.]

FOYE M. MURPHY,
Notary Public.

*Interrogatories Propounded by the Respondent to be Answered by
the Libellant under Oath.*

Int. 1. Please state whether the libellant by itself or agent did, from the date when said canal was publicly announced to be open for use by the public in the navigation and passage of the same by vessels to and including December 14, 1916, solicit vessels to use and pass through said canal in consideration of tolls prescribed by libellant.

Int. 2. Please state whether on or before December 13, 1916, the libellant by itself or agent solicited vessels of the type of the steamer Bay Port, both loaded and light, to use and pass through said canal.

Int. 3. Please state whether, prior to December 13, 1916, it was publicly stated, announced or represented by the libellant that there was a minimum depth of 25 feet of water at mean low water in said canal.

Int. 4. If the answer to Interrogatory 3 is in the affirmative, please state whether any modification of said statement, announcement or representation was made by libellant on or before December 13, 1916.

Int. 5. If the answer to Interrogatory 4 is in the affirmative, state fully what modification of said statement, announcement or representation was made by the libellant, and to whom, and when notice of said modification was given.

Int. 6. Did the libellant, prior to December 13, 1916, publicly state, announce or represent that there was sufficient water in said canal for the passage of vessels up to a stated draft or to stated drafts?

Int. 7. If the answer to the preceding interrogatory is in the affirmative, state what was the maximum of said stated drafts.

Int. 8. If the answer to Interrogatory 6 is in the affirmative, please state whether any modification of said statement, announcement or representation was made by libellant on or before December 13, 1916.

Int. 9. If the answer to Interrogatory 8 is in the affirmative, state what modification of said statement, announcement or representation was made by the libellant, and to whom and when notice of said modification was given.

Int. 10. Please state what, if any, information was received on December 13, 1916, at the Buzzard's Bay office of the libellant, or by any of libellant's agents or servants, from Wing's Neck or elsewhere regarding the steamer Bay Port, by whom said information was given and by whom received, and what, if anything, was done in consequence thereof; if said steamer was seen proceeding towards or through said canal by the superintendent or any officer or agent of the libellant, please state who said observer was, his position in the libellant company and where he was when he saw said steamer.

Int. 11. Please state whether on December 13, 1916, the libellant

or any of its officers, servants or agents, in response to an application by the master or other officer of said steamer Bay Port for passage through said canal by said steamer, directed any person to pilot said steamer through said canal.

Int. 12. If your answer to Interrogatory 11 is in the affirmative, please name the person who gave the direction, the person who received the direction, and the exact words or the substance of the direction.

Int. 13. On December 13, 1916, was one George G. Rochester engaged in piloting vessels through said canal?

Int. 14. If the answer to Interrogatory 13 is in the affirmative, please state in detail the relation between the libellant and said Rochester.

Int. 15. Was said Rochester in the employ of the libellant on December 13, 1916?

Int. 16. Was said Rochester engaged in piloting vessels in said canal under any agreement with the libellant?

Int. 17. If your answer to Interrogatory 16 is in the affirmative and said agreement is in writing, please annex the original or a copy thereof to your answers; if oral, please state the substance thereof as accurately as possible.

Int. 18. What, if any, remuneration was received by said Rochester or accrued to him from the libellant for the pilotage of vessels through said canal for a period of four months prior to December 13, 1916, giving the rate of remuneration, the amounts paid and the dates when paid.

Int. 19. On December 14, 1916, was one William Lewis engaged in piloting vessels through said canal?

Int. 20. If the answer to Interrogatory 19 is in the affirmative, please state in detail the relation between the libellant and said Lewis.

Int. 21. Was said Lewis in the employ of the libellant on December 14, 1916?

Int. 22. Was said Lewis engaged in piloting vessels in said canal under any agreement with the libellant?

Int. 23. If your answer to Interrogatory 22 is in the affirmative, and said agreement is in writing, please annex the original, or a copy thereof, to your answers; if oral, please state the substance thereof, as accurately as possible.

Int. 24. What, if any, remuneration was received by said Lewis or accrued to him from the libellant for the pilotage of vessels through said canal for a period of four months prior to December 13, 1916, giving the rate of remuneration, the amounts paid and the dates when paid.

Int. 25. Please describe in detail the relation between The Cape Towing Corporation and the libellant from the time of the incorporation of said Towing Corporation to and including December 14, 1916.

Int. 26. What agreement, if any, existed on December 13, 1916, between the libellant and The Cape Towing Corporation relating to the services of tugs in the passage of vessels through said canal?

Int. 27. If said agreement is in writing, please annex the original or a copy thereof to your answers; if oral, please state the substance thereof.

76

Int. 28. Were the tugs Dalzelline, Hazleton and John C. Stuart, or one or more of them, operated in said canal on December 13, 1916, under any agreement or charter with the libellant?

Int. 29. If Interrogatory 28 is answered in the affirmative, and said agreement is in writing, please annex the original or a copy thereof to your answers; if oral, please state the substance thereof.

Int. 30. From whom did the masters or officers of the tugs Dalzelline, Hazleton and/or John C. Stuart receive their orders in relation to their work in or about the canal during December, 1916, and particularly on December 13 and 14, 1916.

Int. 31. Please annex hereto original deck and engine logs of the steamtugs Dalzelline, Hazleton and John C. Stuart covering December 13 and 14, 1916.

Int. 32. When and by whom were the entries in said logs made?

Int. 33. Were said towboats on December 13, 1916, and/or December 14, 1916, under the general command of Captain E. R. Geer?

Int. 34. Was Captain Geer at said time superintendent of the libellant in the operation of said canal?

Int. 35. Did The Cape Towing Corporation have title to any steamtugs up to December 15, 1916?

Int. 36. Was there on December 13, 1916, a credit and/or debit account or accounts between the libellant and The Cape Towing Corporation?

Int. 37. If you answer Interrogatory 36 in the affirmative, please annex the original or a copy of said accounts to your answers, or allow proctors for respondent to examine the same.

Int. 38. What part, if any, of the tolls received by the libellant for the passage of vessels, to and including December 13, 1916, through said canal, was paid or credited to The Cape Towing Corporation and/or the Cape Pilot Association for the services of tugs and/or pilots to said vessels?

Int. 39. Please give the names of all officers, stockholders and/or employees of the libellant who were also officers, stockholders and/or employees of The Cape Towing Corporation, and state what offices or positions they held in each company.

77

Int. 40. Please describe in detail the relation between the Cape Pilot Association and the libellant on December 13 and 14, 1916.

Int. 41. What agreement, if any, existed on said dates between said Cape Pilot Association and the libellant relating to the services of pilots in the passage of vessels through said canal?

Int. 42. If said agreement is in writing, please annex the original or a copy thereof to your answers; if oral, please state the substance thereof.

Int. 43. Please name the pilots in said Pilot Association on December 13 and 14, 1916, and state from whom they received their orders on said dates and also during the months of November

and December, 1916, relative to the pilotage of vessels in and through said canal, and state which of said pilots were employees of the libellant.

Int. 44. Were pilots Rochester and/or Lewis on December 13 and 14, 1916, under the general command of Captain E. R. Greer?

Int. 45. Did pilot Rochester make to the libellant a report of the stranding of said steamer Bay Port?

Int. 46. Did pilot William Lewis make to the libellant a report of the stranding of said steamer Bay Port?

Int. 47. Were said pilots, or either of them, on December 13 and / or 14, 1916, upon the pay-roll of the libellant?

Int. 48. Was there on December 13 and 14, 1916, a credit and/or debit account or accounts between the Cape Pilot Association and the libellant?

Int. 49. If you answer Interrogatory 48 in the affirmative, please annex the original or a copy of said accounts to your answers, or allow proctors for respondent to examine the same.

Int. 50. Where was the tug Hazelton while said steamer Bay Port was at Wings' Neck on December 13, 1916?

Int. 51. Where was the tug John C. Stuart while said steamer Bay Port was at Wing's Neck on December 13, 1916?

Int. 52. On December 13 and 14, 1916, was said Rochester specially licensed by the libellant to pilot vessels through said canal?

Int. 53. On December 13 and 14, 1916, was said William Lewis specially licensed by the libellant to pilot vessels through
78 said canal?

Int. 54. Please annex to your answers or allow the respondent or its proctors to examine all plans, blueprints, descriptions, data, surveys, soundings or reports thereof made by or prepared for the libellant, showing the depths of water in said canal and the condition and character of the bottom from the point where said steamer first grounded to one-quarter mile to the westward thereof and also from the point where said steamer sank to one-half mile to the westward thereof, and state the dates when said surveys and soundings were made, by whom and in what manner the soundings were taken, whether by sweeping or vertically, and, if by the latter method, at what intervals they were made.

Int. 55. Subsequently to September 14, 1916, has the libellant cause to be made any soundings or surveys of the bottom of said canal between the Bourne Highway and Sagamore bridges, and particularly from the point where said steamer first lay aground to one-quarter mile westward, and also from the point where said steamer lay sunk to one-quarter mile westward?

Int. 56. If your answer to Interrogatory 55 is in the affirmative, please annex to your answers originals or copies of all plans, blueprints, descriptions, data, surveys, soundings or reports thereof made by or for the libellant, showing the depths of water in said canal and the condition and character of the bottom, stating the dates when said surveys and soundings were made, by whom and in what manner the soundings were taken, whether by sweeping or vertically, and, if by the latter method, at what intervals they were made.

Int. 57. Is it a fact that, within a quarter of a mile to the westward of the point where said steamer Bay Port first struck, the rip-rap in places had, prior to December 13, 1916, been gradually lowering by reason of the fact that the sand had filtered out into said canal?

Int. 58. Is it a fact that said canal within a quarter of a mile to the westward of the point where said steamer Bay Port first struck had, prior to December 13, 1916, gradually been in spots shoaling?

Int. 59. Is it a fact that a point near where the steamer Bay Port sheered to starboard just prior to her first grounding there
79 existed on December 13, 1916, on the north side of the canal a so-called "knuckle" which caused a swirl tending to throw a vessel's bow proceeding eastward against a westward current to starboard?

Int. 60. If the answer to Interrogatory 59 is in the affirmative, state fully: (a) the origin of said "knuckle"; (b) how long prior to December 13, 1916, said "knuckle" had existed in said canal; (c) its dimensions, location, formation, the depth of water over it at mean low water on December 13, 1916, the distance it extended out into the channel; and in answering this interrogatory state from which bank said "knuckle" extended.

Int. 61. How many feet to the eastward of Bourne Highway Bridge did the Bay Port strike the bank on December 13, 1916?

Int. 62. How many feet to the eastward of Bourne Highway Bridge did the Bay Port first strike the bank on December 14, 1916?

Int. 63. How many feet to the eastward of Bourne Highway Bridge did the Bay Port sink?

Int. 64. If the answer to Interrogatory 59 is in the affirmative, state how many feet to the eastward of Bourne Highway Bridge was said "knuckle" located.

Int. 65. Is it a fact that within a quarter of a mile to the westward of the point where said steamer Bay Port finally sank the rip-rap in places had, prior to December 13, 1916, been gradually lowering by reason of the fact that the sand had filtered out into said canal?

Int. 66. Is it a fact that said canal within a quarter of a mile to the westward of the point where said steamer Bay Port finally sank had, prior to December 14, 1916, gradually been in spots shoaling?

Int. 67. If the answer to Interrogatory 66 is in the affirmative, state fully: (a) the origin of said shoal or shoals; (b) how long prior to December 14, 1916, said shoal or shoals had existed; (c) the dimension, location, formation of said shoal or shoals on December 14, 1916, and the depth of water at mean low water on said date over
80 said shoal or shoals; and in answering this interrogatory state how far to the westward of where said steamer Bay Port sank each of said shoals was located.

Int. 68. Did libellant's superintendent or any of its officers give pilot Rochester and/or pilot William Lewis any information prior to December 13, 1916, about the existence of any of the shoals referred to in the preceding interrogatories?

Int. 69. If the answer to Interrogatory 68 is in the affirmative,

state fully what information was given to either or both of said pilots, when and by whom it was given.

Int. 70. Subsequently to December 14, 1916, did the libellant cause any dredging to be done in said canal (a) within a quarter of mile of the place where the Bay Port struck on December 13, 1916; (b) within half a mile of the place where the Bay Port sank?

Int. 71. Had any agreement or agreements for dredging the canal which would apply to the portions referred to in Interrogatory 70 been entered into by or in behalf of the libellant prior to December 14, 1916, the work on which was begun subsequent to said date?

Int. 72. If your answer to Interrogatory 71 is in the affirmative, please annex to your answers the original agreement or agreements, or copies thereof, if in writing, or state the substance thereof, if oral.

Int. 73. If the answer to Interrogatory 71 is in the affirmative, state: (a) when said dredging was commenced and when it was completed; (b) how many days each dredge was at work in said portion of the canal; (c) what dredges or dredge was engaged in said work, the daily position in feet of each dredge, measuring from Bourne Highway Bridge; (d) the daily amount and character of material removed by each dredge; (e) the depths of water at mean low water in that portion of said canal where said dredging was done, both at the time said dredging was begun and at the time it was completed; and in answering this interrogatory give all depths throughout the area dredged of which the libellant or its agents or agent has any knowledge.

Int. 74. Please state at what time was the highest water in said canal between the Bourne Highway and Sagamore bridges in the day of December 13, 1916.

81 Int. 75. Please state at what time was the highest water in said canal between the Bourne Highway and Sagamore bridges in the day of December 14, 1916.

Int. 76. Please state the direction and velocity of the current and state of the tide at 2.15 p. m., December 13, 1916, at the point where said steamer Bay Port first grounded.

Int. 77. Please state the direction and velocity of the current and state of the tide at 10.15 a. m., December 14, 1916, at the point where said steamer Bay Port finally sank.

Int. 78. On December 13, 1916, what was the rise of the tide at the point where said steamer Bay Port first grounded?

Int. 79. On December 13, 1916, what was the rise of the tide at the point where said steamer Bay Port finally sank?

Int. 80. On December 13 and December 14, 1916, what was the width of the channel bottom, the angle of the slope, the width of said canal at mean sea level and the character of the bottom,—

(a) Beginning at the point where the steamer Bay Port first struck and extending one-quarter mile to the westward thereof.

(b) Beginning at the point where the steamer Bay Port finally sank and extending one-half mile to the westward thereof.

Int. 81. Did one Burnside Value, prior to December 13, 1916, make, on behalf of the libellant, solicitation of the respondent,

through its agents, Crowell & Thurlow, or any member or agent of said firm, to have its steamers use said canal?

Int. 82. If the answer to Interrogatory 81 is in the affirmative, did said Value make such solicitation by authority of the libellant?

Int. 83. Did said Value, prior to December 13, 1916, represent to said Crowell & Thurlow, or to any member or agent of said firm, that there were 25 feet of water at mean low tide in the channel of said canal?

Int. 84. If the answer to Interrogatory 83 is in the affirmative, did said Value make such representation by authority of the libellant?

Int. 85. Please describe in detail what damage the libellant alleges to have suffered by reason of the grounding and sinking of said steamer Bay Port in said canal.

82 Int. 86. What amount, if anything, has been paid by the libellant to The Cape Towing Corporation for the services of its tugs on or after December 13, 1916, by reason of the stranding and sinking of the steamer Bay Port in said canal?

Int. 87. Please itemize the cost to the libellant of removing said steamer Bay Port from said canal.

Int. 88. Please state the daily gross and net earnings of said canal accruing from the passage of vessels through the same, for one year prior to December 14, 1916, while said steamer lay in said canal, and for a period of four months subsequent to December 14, 1916.

Int. 89. Please state what net loss the libellant claims to have sustained in said earnings by reason of said grounding and sinking, and the method by which said loss is estimated.

Int. 90. Please annex to your answers an itemized list of all articles and materials, parts of said steamer, her tackle, apparel and furniture, which were saved, and the value of the same.

Int. 91. Who was the director or officer in charge of said canal during December, 1916?

Int. 92. Was J. W. Miller an officer of the Boston, Cape Cod & New York Canal Company? If so, state what office he held in said company, and what his duties were with respect to the management of said canal.

Int. 93. Did said Miller investigate the facts of the stranding of said steamer Bay Port in said canal?

Int. 94. If the answer to the preceding interrogatory is in the affirmative, state when and where he made such investigation.

Int. 95. If the answer to Interrogatory 93 is in the affirmative, were the questions put to witnesses and the answers of the witnesses taken in shorthand?

Int. 96. If the answer to the preceding question is in the affirmative, state who took the shorthand notes of said investigation.

Int. 97. If the answer to Interrogatory 95 is in the affirmative, is said stenographer still in the employ of the Boston, Cape Cod & New York Canal Company?

83 Int. 98. If the answer to Interrogatory 95 is in the affirmative, were the shorthand notes taken by the stenographer written out?

Int. 99. If the answer to Interrogatory 98 is in the affirmative, have said notes been preserved?

Int. 100. If the answer to Interrogatory 98 is in the affirmative, please annex both the original notes and the transcript made of the same, together with all statements made in reference to said investigation, or appoint a time and place where the same may be inspected by respondent.

Int. 101. What, if any, orders were given by pilot Rochester on December 13, 1916, to those in charge of the tug Dalzelline, either before or after said pilot boarded said steamer Bay Port at Wing's Neck on said date?

Int. 102. What, if any orders were given by Pilot William Lewis to those in charge of the tug Dalzelline and/or the tug Hazelton and/or the tug John C. Stuart on December 14, 1916?

Int. 103. What, if anything, was done by the tug Dalzelline without orders from pilot Rochester on December 13, 1916, while assisting said steamer Bay Port?

Int. 104. What, if anything, was done by the tug Dalzelline without orders from pilot William Lewis on December 14, 1916, while assisting said steamer Bay Port?

Int. 105. How many feet to the eastward of Bourne Highway Bridge is Bournedale Ferry, so called, located?

WHITE OAK TRANSPORTATION COMPANY,
By BLODGETT, JONES, BURNHAM &
BINGHAM,
Proctors.

Exceptions of Respondent to Certain Interrogatories Propounded by the Libellant.

[Filed May 17, 1917.]

The respondent excepts to Interrogatories 13, 14, 111 and 112, upon the ground that the same do not ask for information with reference to any fact, matter or thing alleged in said libel, and do not seek to elicit information in support of the libellant's case or in
84 support of any allegation in said libel contained, and on the ground that the same are irrelevant, immaterial and incompetent.

WHITE OAK TRANSPORTATION
COMPANY,
By Its Proctors, BLODGETT, JONES, BURNHAM &
BINGHAM.

This cause was thence continued from term to term to the September Term, A. D. 1917, when, to wit, November 7, 1917, the following Motion was filed:

Motion by Respondent That Libellant be Ordered to Answer Interrogatories.

[Filed November 7, 1917.]

Now comes the respondent in the above-entitled case, and moves that the libellant be ordered to answer Interrogatories 1 to 105, propounded to it by said respondent.

WHITE OAK TRANSPORTATION
COMPANY,

By Its Proctors, BLODGETT, JONES, BURNHAM &
BINGHAM.

At the same term, to wit, November 26, 1917, the following Exceptions *was* filed:

Exceptions of Libellant to Certain Interrogatories Propounded by the Respondent.

[Filed November 26, 1917.]

The libellant excepts to interrogatories numbered 31, 32, 35, 36, 37, 50, 51, 54, 55, 56, 70, 91, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103 and 104, upon the ground that the same do not ask for information with reference to any fact, matter or thing alleged in said libel or answer, and do not seek to elicit information in support of the respondent's case or in support of any allegation in said answer contained; and upon the ground that the same are irrelevant, immaterial and incompetent.

And the libellant excepts further to the following interrogatories hereinbefore mentioned, on the additional grounds hereinafter set forth:

As to Interrogatory 31, in that the information sought is not exclusively within the knowledge and control of the libellant, the respondent having the same opportunity to secure such information, and in that the documents inquired for are not in issue, and, therefore, the respondent is not entitled to interrogate upon the same.

As to Interrogatory 32, in that the same objections apply as hereinbefore mentioned with reference to Interrogatory 31.

As to Interrogatory 35, in that the information sought is not within the exclusive knowledge and control of the libellant, the respondent having equal opportunity to secure the same.

As to Interrogatory 36, in that the account inquired for is not in issue and not properly a matter for interrogation.

As to Interrogatory 37, in that the account sought is not in issue and not properly a subject for interrogation.

As to Interrogatory 50, in that the information sought is not

within the exclusive knowledge and control of the libellant, the respondent having equal opportunity to secure the same.

As to Interrogatory 51, in that the information sought is not within the exclusive knowledge and control of the libellant, the respondent having equal opportunity to secure the same.

As to Interrogatory 54, in that the plans, etc., inquired for are not in issue and are not proper matters of interrogation, and in that it attempts to force the libellant to prepare the respondent's case for trial.

As to Interrogatory 93, in that it seeks to have the libellant prepare the respondent's case for trial, and in that it attempts to obtain names of the libellant's witnesses to discover in advance the nature of their testimony.

As to Interrogatory 94, in that it seeks to have the libellant prepare the respondent's case for trial, and in that it attempts to obtain names of the libellant's witnesses to discover in advance the nature of their testimony.

As to Interrogatory 95, in that it seeks to have the libellant prepare the respondent's case for trial, and in that it attempts to
86 obtain names of the libellant's witnesses to discover in advance the nature of their testimony.

As to Interrogatory 96, in that it seeks to have the libellant prepare the respondent's case for trial, and in that it attempts to obtain names of the libellant's witnesses to discover in advance the nature of their testimony.

As to Interrogatory 97, in that it seeks to have the libellant prepare the respondent's case for trial, and in that it attempts to obtain names of the libellant's witnesses to discover in advance the nature of their testimony.

As to Interrogatory 98, in that it seeks to have the libellant prepare the respondent's case for trial, and in that it attempts to obtain names of the libellant's witnesses to discover in advance the nature of their testimony.

As to Interrogatory 99, in that it seeks to have the libellant prepare the respondent's case for trial, and in that it attempts to obtain names of the libellant's witnesses to discover in advance the nature of their testimony.

As to Interrogatory 100, in that it seeks to have the libellant prepare the respondent's case for trial, and in that it attempts to obtain names of the libellant's witnesses to discover in advance the nature of their testimony.

As to Interrogatory 101, in that the information sought is not within the exclusive power of the libellant, the respondent having equal opportunity to secure the same.

As to Interrogatory 102, in that the information sought is not within the exclusive knowledge and control of the libellant, the respondent having equal opportunity to secure the same.

As to Interrogatory 103, in that the information sought is not within the exclusive knowledge and control of the libellant, the respondent having equal opportunity to secure the same.

As to Interrogatory 104, in that the information sought is not

within the exclusive knowledge and control of the libellant, the respondent having equal opportunity to secure the same.

BOSTON, CAPE COD & NEW YORK CANAL
COMPANY,

By its Proctors, CURRIER, YOUNG & PILLSBURY.

87 On the said twenty-sixth day of November, this cause was set down for hearing on the foregoing exceptions to certain interrogatories and was thence continued under advisement to the December Term, A. D. 1918, when, to wit, March 13, 1918, a Memorandum in re Interrogatories was announced by the court, the last paragraph of which is as follows: "It follows that the libellant should be allowed to examine the plans, blue-prints, etc., specified in Interrogatory 54; the Canal Company should answer Interrogatory 55; as to Interrogatory 56, what has been said as to Interrogatory 54 applies; Interrogatory 70 should be answered. Of Interrogatory 73, (a) should be answered and the first part of (e); the rest need not be answered. The new interrogatories numbered 106 to 111, inclusive, may be filed and should be answered in accordance with the foregoing suggestions. The Transportation Company may present a draft of order if necessary."

On the said thirteenth day of March, A. D. 1918, the following Motion to Amend Answer was filed:

Motion to Amend Answer.

[Filed March 13, 1918.]

Now comes the respondent in the above-entitled case and moves to amend its answer by the addition thereto of the following interrogatories:

Int. 106. Please annex to your answers, or allow the respondent or its proctors to examine all plans, blue-prints, descriptions, data, surveys, soundings or reports thereof made by or prepared for the libellant based on information obtained subsequent to the time it was announced that there were 25 feet of water at mean low water in said canal, and prior to the grounding of said steamer Bay Port in said canal, showing the depths of water in said canal, and the condition and character of the bottom, from the point where said steamer first grounded to one-quarter mile to the westward thereof. State the date when said surveys and soundings were made, by whom and in what manner they were taken, whether by
88 sweeping or vertically, and if by the latter method, at what intervals they were made.

Int. 107. Please annex to your answers, or allow the respondent or its proctors to examine all plans, blue-prints, descriptions, data, surveys, soundings or reports thereof made by or prepared for the libellant, based on information obtained subsequent to the time it was announced that there were 25 feet of water at mean low water in said canal, and prior to the grounding of said steamer Bay Port

in said canal, showing the depths of water in said canal and the condition and character of the bottom from the point where said steamer sank to one-half mile to the westward thereof. State the date when said surveys and soundings were made, by whom and in what manner they were taken, whether by sweeping or vertically, and if by the latter method, at what intervals they were made.

Int. 108. Please state whether between the point where the steamer Bay Port first grounded to one-quarter mile to the westward thereof there existed on December 13, 1916, places in said canal where there was less than 25 feet of water at mean low water.

Int. 109. If Interrogatory 108 is answered in the affirmative, please state in detail where said places were located, how many feet each was from the Bourne Highway Bridge, or from the place where said steamer first grounded, the distance each was from each side of the canal, the depth of water over each at mean low water, the size of each shoal as nearly as possible, and the character of the bottom on said shoals.

Int. 110. Please state whether between the point where the steamer Bay Port sank to one-half mile to the westward thereof there existed on December 14, 1916, places in said canal where there was less than 25 feet of water at mean low water.

Int. 111. If Interrogatory 110 is answered in the affirmative, please state in detail where said places were located, how many feet each was from the Bourne Highway Bridge, or from where said steamer sank, the distance each was from each side of the canal, the depth of water over each at mean low water, the size of
89 each shoal as nearly as possible, and the character of the bottom at said shoals.

WHITE OAK TRANSPORTATION
COMPANY,

By its Proctors, BLODGETT, JONES, BURNHAM &
BINGHAM.

This cause was thence continued to the March Term, A. D. 1918, when this cause came on to be heard by the court on the nineteenth, twentieth, twenty-first, twenty-second, twenty-sixth, twenty-seventh and twenty-eighth days of March, A. D. 1918.

On the said twenty-seventh day of March, A. D. 1918, the following Answers to Interrogatories *was* filed.

Answers of Libellant to Interrogatories Propounded by Respondent.

[Filed March 27, 1918.]

1. Yes.
2. The libellant solicited passage through the canal by self-propelled vessels if the same were in a proper and seaworthy condition, properly loaded, manned and equipped.
3. Yes.
4. There was no modification on or before the date mentioned.
5. See answer to Interrogatory 4.
6. Yes.

7. 20 feet.

8. There was no modification on or before the date mentioned.

9. See answer to Interrogatory 8.

10. At about 11 a. m. on December 13, 1916, it was reported to E. R. Geer, the libellant's superintendent, at its Buzzard's Bay office in the usual course, that the Bay Port was at Wing's Neck for the purpose of passing through the canal. He thereupon communicated this information to the Cape Pilot Association, a voluntary association of pilots duly licensed by the United States for the waters of Buzzard's Bay and the Cape Cod Canal, and having its principal place of business at Buzzard's Bay. Later, while in the libellant's Buzzard's Bay office, said Geer saw the Bay Port as
90 she passed through the drawbridge at that point in tow of the Dalzelline.

11. No, nothing was done by the libellant by way of causing the Bay Port to be piloted through the canal except as stated in answer to Interrogatory 10.

12. See answer to Interrogatory 11.

13. Yes.

14. On December 13 and 14, 1916, Rochester was not in the libellant's employ and no arrangement or agreement between him and the libellant existed except that, by virtue of an oral guaranty given prior to these dates, the libellant guaranteed that the pilots belonging to the Cape Pilot Association would earn a certain amount, but the libellant has never been called upon to make any payment on account of this guaranty.

15. No.

16. No; see answer to Interrogatory 14.

17. See answer to Interrogatory 16.

18. See answer to Interrogatory 14.

19. Yes.

20. On December 14, 1916, Lewis was not in the libellant's employ and no arrangement or agreement between him and the libellant existed. As a member of the Cape Pilot Association, Lewis had the benefit of the guaranty referred to in the answer to Interrogatory 14.

21. No.

22. No; see answer to Interrogatory 20.

23. See answer to Interrogatory 20.

24. See answer to Interrogatory 20.

25. On December 13 and 14, 1916, there was in force between the libellant and The Cape Towing Corporation a contract dated September 8, 1916, a copy whereof is annexed. The relation between the libellant and The Cape Towing Corporation on the date in question is fully set out in said contract.

26. The only agreement existing on December 13, 1916, between the libellant and The Cape Towing Corporation relative to
91 the service of tugs in the passage of vessels through the canal was the agreement referred to in the answer to Interrogatory

25.

27. See answer to Interrogatory 26.

28. On the date in question the only existing agreement or charter with the libellant relative to the operation of any tug or tugs in the canal was the agreement referred to in the answer to Interrogatory 25.

29. See answer to Interrogatory 28.

30. From the manager of The Cape Towing Corporation, except that when Captain Joseph Lewis of The T. A. Scott Company, Inc., took charge of the Bay Port on the evening of December 13, 1916, all the tugs referred to became, together with their crews, subject to his orders and remained so subject until after the Bay Port finally sank in the canal on the following day.

31. Said tugs were not operated by or in the control of the libellant and no logs for said tugs were kept by the libellant.

32. As officer of the Boston, Cape Cod & New York Canal Company I have no information upon the matter asked for.

33. The tugs referred to were under the general command of Captain Geer as manager of The Cape Towing Corporation up to the time when they became subject to the orders of Captain Lewis, as stated in the answer to Interrogatory 30, at which time Captain Geer turned over the general command of said tugs to Captain Lewis, by whom such command was at once assumed.

34. Yes; but he was not acting as superintendent of the libellant in relation to or in connection with said towboats or Cape Towing Corporation.

35. As officer of the Boston, Cape Cod & New York Canal Company I have no information upon the matter asked for.

36. There was a credit account in favor of The Cape Towing Corporation on the books of the libellant.

37. A copy of said credit account is hereto annexed.

38. No part.

39. On December 13, 1916, Charles Maass was secretary of the libellant and secretary and treasurer of The Cape Towing Corporation; E. R. Geer was employed by the libellant as superintendent and by The Cape Towing Corporation as manager.

40. No agreement or arrangement (other than the guaranty referred to in the answer to Interrogatory 14) existed on the dates mentioned.

41. No agreement (other than the guaranty referred to in the answer to Interrogatory 14) existed on the dates mentioned.

42. See answer to Interrogatory 41.

43. The members of The Cape Pilot Association on December 13 and 14, 1916, were George G. Rochester and William Lewis, together with others whose names the libellant is unable to state. The members of the association upon the dates mentioned and during the months of November and December, 1916, received no orders from anyone relative to the pilotage of vessels in or through the canal, but acted on their responsibility as licensed pilots, except in so far as Rochester or Lewis may have acted under the orders of Captain Joseph Lewis after he took charge of the Bay Port on

the evening of December 13, 1916. None of the members of the association were employees of the libellant.

44. No.

45. No.

46. No.

47. No.

48. No.

49. See answer to Interrogatory 48.

50. As officer of the Boston, Cape Cod & New York Canal Company I have no information on the matter asked for.

51. As officer of the Boston, Cape Cod & New York Canal Company I have no information on the matter asked for.

52. No.

53. No.

54. Such plans, blueprints, descriptions, data, surveys, soundings or reports thereof, described in Interrogatory 54, may be examined by the proctors for the respondent at the office of Currier, Young & Pillsbury, 84 State Street, Boston, Massachusetts, proctors for the libellant.

93 55. All such soundings or surveys mentioned in Interrogatory 55 are contained in the plans, blueprints, descriptions, data, surveys, soundings or reports thereof mentioned in answer to Interrogatory 54.

56. All such soundings or surveys mentioned in Interrogatory 56 are contained in the plans, blueprints, descriptions, data, surveys, soundings or reports thereof mentioned in answer to Interrogatory 54.

57. A slight amount of rip-rap was displaced above the high water mark, but very little, if any, below high water mark.

58. No. A slight amount of sand passed through the canal by reason of the tides and was deposited in slight amounts in various places through the canal, but in no instance or locality was there sand or other material deposited in sufficient amount to constitute an obstruction in the canal or to endanger navigation.

59. No.

60. See answer to Interrogatory 59.

61. 11,150.

62. 16,350.

63. 17,750.

64. See answer to Interrogatory 59.

65. There was some slight displacement of the rip-rap above the water line, but very little, if any, below the water line.

66. No. A slight amount of sand passed through the canal by reason of the tides and was deposited in slight amounts in various places through the canal, but in no instance or locality was there sand or other material deposited in sufficient amount to constitute an obstruction in the canal or to endanger navigation.

67. See answer to Interrogatory 66.

68. No.

69. See answer to Interrogatory 68.

70. As to (a) and (b) of Interrogatory 70, the libellant answers that dredging was done several hundred feet west of where the Bay Port first struck and also several hundred feet west of where the Bay Port finally sank. The dredging, however, was not for the purpose of removing any shoals which could have affected navigation.

71. No.

72. See answer to Interrogatory 71.

73. See answer to Interrogatory 71.

74. 12.00 m.

75. 1.00 p. m.

76. West 3 knots. Four feet above mean low water.

77. East 3 knots. Three feet above mean low water.

78. Four and one-half feet.

79. Six feet.

80. One hundred, one on two. Two hundred and sixteen feet.

(a) Sand and boulders.

(b) Sand.

81. Yes.

82. Yes.

83. The libellant is ignorant of any representations made by the said Value; therefore cannot say what representations, if any, were made by said Value.

84. See answer to Interrogatory 83.

91. Captain E. R. Geer was acting superintendent of the libellant, with headquarters at Buzzard's Bay.

92. Yes; vice-president and general manager, his duties being fixed by the by-laws of the company, which may be examined by proctors for the respondent at the office of Currier, Young & Pillsbury, No. 84 State Street, Boston, Massachusetts, proctors for the libellant.

101. As officer of the Boston, Cape Cod & New York Canal Company I have no knowledge of the matters asked for in this interrogatory.

102. As officer of the Boston, Cape Cod & New York Canal Company I have no knowledge of the matters asked for in this interrogatory.

103. As officer of the Boston, Cape Cod & New York Canal Company I have no knowledge of the matters asked for in this interrogatory.

104. As officer of the Boston, Cape Cod & New York Canal Company I have no knowledge of the matters asked for in this interrogatory.

105. 16,140 feet.

106. All such plans, blueprints, descriptions, data, surveys, soundings or reports thereof mentioned in this interrogatory are contained in the plans, blueprints, descriptions, data, surveys, soundings or reports mentioned in answer to Interrogatory 54, the same being too bulky and cumbersome to attach to these answers, but the proctors for the respondent may examine the same at the office of Currier, Young & Pillsbury, 84 State Street, Boston, Massachusetts, proctors for the libellant.

107. See answer to Interrogatory 54.

108. Yes.

109. Said shallow spot was located at or about Station 243, which is approximately two miles east of the Bourne Bridge, but at said place the water was not shallow enough to interfere with the navigation of the Bay Port, said vessel having passed there in safety. The facts with reference to said shallow place are shown in the blueprints mentioned in answer to Interrogatory 54.

110. Yes.

111. The place mentioned in answer to Interrogatory 110 was approximately at Station 193, which is approximately three miles east of Bourne Bridge, but said place did not interfere with the navigation of the Bay Port, said vessel having passed this spot in safety. The facts with reference to said shallow place are shown in the blueprints mentioned in answer to Interrogatory 54.

JOHN J. COAKLEY.

Subscribed and sworn to this twenty-sixth day of March, 1918,
before me,

THOMAS H. MAHONEY.

Justice of the Peace.

96 Cape Towing Corporation in a/c with Boston, Cape Cod &
New York Canal Co.

1916	Debit.		
Sept. 14.	To Cash, E. R. Geer, Supt.....	V-W 453	\$248.28
	" " do.	V-W 454	239.32
20.	" Despard & Co.	V-B 441	1,420.33
Oct. 13.	" E. R. Geer, Supt.	V-W 489	31.75
20.	" Cape Towing Corp.	V-B 511	39.50
23.	" Fuel a/c Transfer Coal Sept.		1,620.00
27.	" Cash, E. R. Geer, Supt.	V-W 520	10.51
	" " do.	V-B 513	14.00
Nov. 1.	" Boston Tow Boat Co.	V-B 520	1,840.00
10.	" Cape Towing Corp.	V-B 527	79.50
15.	" E. R. Geer, Supt.	V-W 523	8.78
	" Cape Towing Corp.	V-B 530	10.00
17.	" Despard & Co.	V-B 536	1,100.00
20.	" Cape Towing Corp.	V-B 541	22.00
21.	" " do.	V-B 544	30.00
	" Collection a/c Tfr. E. R. Geer, Supt.		17.38
22.	" Cash, Standard Oil Co.	V-B 549	90.00
	" " Geo. M. Auten & Co.	V-B 555	1,102.75
	" " Thomas Wallace	V-W 527	1.25
	" " E. R. Geer, Supt.	V-W 558	36.60
27.	" Fuel a/c Tfr.—Coal Oct.		1,932.00
29.	" Cash, Cape Towing Corp.	V-B 570	12.00
Dec. 5.	" " E. R. Geer, Supt.	V-W 563	4.01

		To cash,	Cape Towing Corp.....	V-B 574	34.50
Dec.	6.	" "	do.	V-B 575	14.00
		" "	do.	V-B 577	14.00
		" "	do.	V-B 578	12.00
	11.	" "	do.	V-B 580	25.00
		" "	E. R. Geer, Supt.....	V-W 566	33.50
	14.	" "	Cape Towing Corp.....	V-B 583	9.00

97 Cape Towing Corporation in a/c with Boston, Cape Cod & New York Canal Co.

1916.

Credit.

Oct.	9.	By Cash,	Scammell Bros.....	\$12.50
	13.	" "	E. D. Morgan.....	16.00
	16.	" "	G. M. Grindal.....	11.00
Nov.	2.	" "	Scammell Bros.....	11.00
	6.	" "	Gilmartin & Trundy.....	20.00
	9.	" "	T. J. Hinckley.....	36.00
	10.	" "	Gilmartin & Trundy.....	12.50
	6.	" "	Cape Towing Corp.....	4,944.87
	15.	" "	Austin F. Riggs.....	10.00
	20.	" "	Gilmartin & Trundy.....	22.00
	21.	" "	A. L. Bellatty.....	20.00
			Towage a/c Tfr. Collection from A. L. Bellatty Oct. 24—trip of 9/10/16.....	10.00
	22.	" "	Accident & Damage a/c Tfr. Towage cancelled A. J. Hooper.....	12.00
Dec.	5.	" "	Cash, Gilmartin & Trundy.....	34.50
	6.	" "	" " " ".....	14.00
		" "	N. J. Atwood.....	14.00
	7.	" "	J. Willard Smith.....	12.00
	12.	" "	Gilmartin & Trundy.....	25.00
	14.	" "	J. W. Gay.....	9.00

At the same term, to wit, April 10, 1918, after due consideration thereon had, a memorandum of decision was announced by the court.

Also at the same term, to wit, April 17, 1918, a request for hearing on limitation of liability was filed in pursuance of suggestion contained in the memorandum of decision.

This cause was thence continued to the present June Term, A. D. 1918, when to wit, September 3, 1918, the following Stipulation as to Hearing on Limitation of Liability is filed:

98 *Stipulation as to Hearing on Limitation of Liability.*

[Filed September 3, 1918.]

It is hereby stipulated and agreed that a hearing upon the issue of the respondent's limitation of liability, in accordance with the libellant's request heretofore filed, may be suspended without preju-

dice to the right of either party to bring said issue forward for a hearing subsequent to a decision on appeal in the above case and/or the cases of White Oak Transportation Company v. Boston, Cape Cod & New York Canal Company and The T. A. Scott Company, Incorporated, and Boston, Cape Cod & New York Canal Company v. The T. A. Scott Company, Incorporated.

BOSTON, CAPE COD & NEW YORK CANAL
COMPANY,

By CURRIER, YOUNG & PILLSBURY,

Proctors.

WHITE OAK TRANSPORTATION
COMPANY,

By BLODGETT, JONES, BURNHAM &
BINGHAM,

Proctors.

On the fourth day of September, A. D. 1918, the following Final Decree is entered:

Final Decree.

September 4, 1918.

MORTON, J.:

This cause came on to be heard, and after a full hearing, and arguments of counsel, and in accordance with the terms of the opinion in this case filed, it is now, to wit, September 4, 1918,

Ordered, adjudged and decreed that the libel be dismissed and that the respondent recover of the libellant costs as taxed by the clerk in the sum of five hundred thirteen and 46/100 dollars together with interest thereon from the date hereof until paid; that unless this decree be satisfied or proceedings thereon be stayed by appeal within the time and in the manner prescribed by law and the rules and practice of this court, execution shall issue accordingly.

By the Court,

FRANK H. MASON,

Deputy Clerk.

90

Approved as to form.

CURRIER, YOUNG & PILLSBURY,

Proctors for Boston, Cape Cod &

New York Canal Company.

BLODGETT, JONES, BURNHAM &
BINGHAM,

Proctors for White Oak Transportation Co.

From the foregoing decree, the libellant claims an appeal to the United States Circuit Court of Appeals for the First Circuit and gives good and sufficient security that it will prosecute its appeal to effect and answer all damages and costs if it fail to make its appeal good, and said appeal is allowed accordingly.

Memorandum of Decision.

April 10, 1918.

No. 1517, Civil.

BOSTON, CAPE COD & NEW YORK CANAL COMPANY

v.

T. A. SCOTT COMPANY, INC.

No. 1518, Civil.

BOSTON, CAPE COD & NEW YORK CANAL COMPANY

v.

WHITE OAK TRANSPORTATION COMPANY.

No. 1555, Civil.

WHITE OAK TRANSPORTATION COMPANY

v.

BOSTON, CAPE COD & NEW YORK CANAL COMPANY.

[NOTE.— The Memorandum of Decision will be found printed on pages 23 to 33, inclusive, of this Transcript of Record.]

Memorandum in re Interrogatories.

March 13, 1918.

MORTON, J.:

The point of inquiry is the condition of the canal at the time of the accident. The vessel owner, as was said in the Watuppa case, "is entitled to full information, so far as the Canal Company has it, as to the physical condition of the canal in the neighborhood where the accident occurred." This is true whether the information was obtained before or after the accident, if it was secured for the ordinary business of the company. A party is not ordinarily to be compelled on interrogatories to disclose the nature and result of special investigation undertaken solely in connection with the prosecution or defence of the case; but knowledge of the clear depth of the canal is so directly connected with the business of the Canal Company that, even if obtained after the accident and primarily for the defence of the case, I think it ought to be disclosed in a fair and reasonable way. A party ought not on interrogatories to be compelled to make expensive plans or copies for the benefit of the other side.

It follows that the libellant should be allowed to examine the plans, blueprints, etc., specified in Interrogatory 54; the Canal Company should answer Interrogatory 55; as to Interrogatory 56, what has been said as to Interrogatory 54 applies; Interrogatory 70 should be answered. Of interrogatory 73, (a) should be answered and the first part of (e); the rest need not be answered. The new interrogatories numbered 106 to 111 inclusive may be filed, and should be answered in accordance with the foregoing suggestions. The Transportation Company may present a draft of order if necessary.

Libellant's Petition for Appeal.

[Filed September 26, 1918.]

The Boston, Cape Cod & New York Canal Company, libellant in the above case, being aggrieved by the decree, rulings and findings therein of the District Court of the United States for the District of Massachusetts, claims an appeal from said decree, rulings and findings and prays that its said appeal may be allowed, and it hereby files with its claim of appeal the following assignment of errors.

By Its Proctors, CURRIER, YOUNG & PILLSBURY.

101

Assignment of Errors.

[Filed September 26, 1918.]

And now comes the Boston, Cape Cod & New York Canal Company, appellant, and makes and files this its assignment of errors.

1. The District Court erred in ruling that the libel does not charge negligence in the management of the steamer after she came off the bank on December 14, 1916, and that no such contention was made by the Canal Company.

2. The District Court erred in finding that the respondent was not negligent in taking or allowing the Bay Port in the canal.

3. The District Court erred in finding the ability of the Bay Port to manœuver was not inferior to the ordinary steamer of her size and type.

4. The District Court erred in finding the Bay Port was not so deeply laden as to interfere with her ability to manœuver.

5. The District Court erred in finding it was generally understood among all parties interested that when the Bay Port came off she should if possible be taken through to Sandwich.

6. The District Court erred in finding that the respondent was not negligent in allowing the Bay Port to come afloat in an unsafe condition.

7. The District Court erred in finding the libellant suffered no appreciable damage from the first of the two accidents.

8. The District Court erred in finding the respondent was not responsible for the first of the two accidents.

9. The District Court erred in finding that the respondent exercised no control over the Bay Port during the salvage operations.

10. The District Court erred in finding that the floating off of the Bay Port was not the proximate cause of the second accident.

11. The District Court erred in finding that the decision to go on through the canal after the Bay Port came afloat was based upon a plan of action which had received the assent of the libellant.

12. The District Court erred in finding that the master of the Bay Port was not negligent in allowing the Bay Port to proceed through the canal after she came afloat on December 14, 1916.

102 13. The District Court erred in finding that the failure to tie the Bay Port at the dolphins on December 14, 1916, was in pursuance of any directions to pilot Lewis given by the libellant's superintendent.

14. The District Court erred in failing to find that the failure to tie the Bay Port at the dolphins on December 14, 1916, was negligence upon the part of the respondent.

15. The District Court erred in failing or refusing to find that the respondent was negligent in causing said steamer to proceed and in attempting to navigate the canal when she was very difficult to steer and control and apt to become unmanageable, failing to answer her helm, which fact was known to the respondent, its officers and agents, or which reasonably should have been known to it and them.

16. The District Court erred in failing or refusing to find that the respondent was negligent in causing said steamer to proceed and in attempting to navigate the canal when she was very difficult to steer and control, which steamer was not provided with manholes or small hatches on the deck in which siphons might be introduced in case of emergency.

17. The District Court erred in failing or refusing to find that the respondent negligently cared for the Bay Port while she was resting on the bank subsequent to the accident of December 13, and negligently suffered the said steamer to slide off the bank at a time when the respondent was at fault in not being prepared to complete the navigation of the canal by the Bay Port, as a result of which she sank in the channel.

18. The District Court erred in failing or refusing to find that the respondent was negligent in that its agents, subsequent to the accident of December 13, negligently permitted the Bay Port to

become afloat in the said canal in an unsafe condition for navigation.

19. The District Court erred in failing or refusing to find that the defendant was negligent in that it did not remove the said steamer from its sunken position in the canal although repeatedly requested to do so by the libellant, but allowed her to remain to be removed by the libellant.

20. The District Court erred in entering a final decree dismissing the libellant herein.

21. The District Court erred in refusing to enter a decree in favor of this libellant for the damages sustained by it by reason of the Bay Port running aground and sinking in the canal as set forth in the pleadings herein, with interest and costs, and in not adjudging the respondent and servants, the master and crew of said steamship Bay Port and pilots employed by the respondent at fault for said running aground and sinking.

Dated Boston, September 26, 1918.

CURRIER, YOUNG & PILLSBURY,

Proctors for Libellants and Appellants.

Bond on Appeal.

[Filed and Approved September 26, 1918.]

Know all men by these presents, that we, Boston, Cape Cod & New York Canal Company, a corporation duly organized and existing under the laws of the Commonwealth of Massachusetts, as principal, and National Surety Company, a corporation organized under the laws of the State of New York and having a usual place of business in Boston in said Commonwealth, as surety, are held and firmly bound unto the White Oak Transportation Company, a corporation duly organized and existing under the laws of the State of Maine, in the full and just sum of two hundred and fifty dollars (\$250) to be paid to the said White Oak Transportation Company, its successors or assigns: to which payment, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, by these presents. Sealed with our seals and dated this 13th day of September in the year of our Lord one thousand nine hundred and eighteen.

Whereas, lately at a District Court of the United States for the District of Massachusetts, in a suit in admiralty depending in said court between Boston, Cape Cod & New York Canal Company and White Oak Transportation Company a decree was entered against the said Boston, Cape Cod & New York Canal Company and the said Boston, Cape Cod & New York Canal Company having obtained an appeal to remove said cause to the United States Circuit Court of Appeals for the First Circuit, to reverse the decree in the aforesaid suit, and a citation directed to the said White Oak Transportation Company, citing and admonishing

it to be and appear in the said United States Circuit Court of Appeals for the First Circuit, in the city of Boston, Massachusetts, on the 25th day of October next.

Now, the conditions of the above obligation is such, that if the said Boston, Cape Cod & New York Canal Company shall prosecute its appeal to effect, and answer all damages and costs if it fail to make its appeal good, then the above obligation to be void; else to remain in full force and virtue.

[SEAL.]

BOSTON, CAPE COD & NEW YORK
CANAL COMPANY.

H. P. WILSON,

Vice-President.

[SEAL.]

NATIONAL SURETY COMPANY,

By W. E. EMMETT,

Resident Vice-President.

Attest:

E. M. McCARTHY,

Resident Asst. Secretary.

Sealed and delivered in presence of
CHAS. MAASS.

Approved:

J. M. MORTON, JR.,

U. S. District Judge.

105

Citation on Appeal.

UNITED STATES OF AMERICA, ss:

The President of the United States to the White Oak Transportation Company, a Corporation Duly Organized and Existing under the Laws of the State of Maine, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the First Circuit, in the city of Boston, Massachusetts, on the twenty-fifth day of October next, pursuant to an appeal duly obtained from a decree of the District Court of the United States for the District of Massachusetts wherein Boston, Cape Cod & New York Canal Company is appellant and you are appellee, to show cause, if any there be, why the said decree, entered against the said appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable James M. Morton. Jr., Judge of the District Court of the United States for the District of Massachusetts, this twenty-sixth day of September, in the year of our Lord one thousand nine hundred and eighteen.

JAMES M. MORTON, JR.,

United States District Judge.

Acknowledgement of Service on Citation.

Due and sufficient service of the within citation is hereby accepted by the White Oak Transportation Company.

By Its Proctors, BLODGETT, JONES, BURNHAM & BINGHAM.

Clerk's Certificate.

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

I, James S. Allen, Clerk of the District Court of the United States for the District of Massachusetts, certify that the two volumes entitled as follows:

106 Volume I, Pleadings;
 Volume II, Testimony;

are true copies of the record and all proceedings in the cause in admiralty entitled, No. 1518. Boston, Cape Cod & New York Canal Company v. White Oak Transportation Company, in said District Court determined, the Memorandum of Decision, dated April 10, 1918, Memorandum in re Interrogatories, dated March 13, 1918, Libellant's Petition for Appeal, Assignment of Errors, Bond on Appeal, and the original Citation issued upon the appeal of the libellant, with the Acknowledgement of Service thereon.

In testimony whereof, I hereunto set my hand and affix the seal of said District Court, at Boston, in said District, this twentieth day of January, A. D. 1919.

[SEAL.]

JAMES S. ALLEN,
Clerk.

107 United States Circuit Court of Appeals for the First Circuit,
 October Term, 1918.

No. 1399.

WHITE OAK TRANSPORTATION COMPANY et al., Appellants,

v.

BOSTON, CAPE COD & NEW YORK CANAL COMPANY et al., Appellees.

Transcript of Record of District Court.

In Admiralty.

No. 1555.

WHITE OAK TRANSPORTATION COMPANY, Libellant, and NORTHERN
COAL COMPANY, Intervening Petitioner,

v.

BOSTON, CAPE COD & NEW YORK CANAL COMPANY, Respondent, and
T. A. SCOTT COMPANY, INC., Impleaded.

The Libel in this cause was filed in the clerk's office on the seven-
teenth day of May, A. D. 1917, and was duly entered at the March
Term of this court, A. D. 1917, and is as follows:

Libel.

[Filed May 17, 1917.]

To the Honorable James M. Morton, Jr., Judge of the District Court
of the United States within and for the District of Massachusetts:

The libel of White Oak Transportation Company, a corporation
duly organized and existing under the laws of the State of
108 Maine, owner of the steamer Bay Port, against, Boston, Cape
Cod & New York Canal Company, a corporation duly or-
ganized and existing under the laws of the Commonwealth of Massa-
chusetts, in a cause of damage, civil and maritime, and thereupon
the libellant alleges as follows:

First. That the libellant, at the time of the events hereinafter
set forth, was and now is a corporation duly organized and exist-
ing under the laws of the State of Maine and having a principal
place of business in Boston in the Commonwealth of Massachusetts,
that at said time the libellant owned and operated the steamer Bay
Port of 1,399 gross and 1,075 net tonnage, 265 feet in length, 38
feet in breadth and of 850 indicated horse power, owned the stores
on board said vessel at said time, and would have been entitled to
the freight earned upon the trip hereinafter referred to; and that
at said time said steamer was tight, staunch and strong, properly
manned, equipped and supplied and in all respects seaworthy.

Second. That the respondent, at the time hereinafter mentioned,
was and now is a corporation duly organized and existing under
and by virtue of the provisions of Chapter 448 of the Acts and
Resolves of 1899 of the Commonwealth of Massachusetts and of acts
amendatory thereof, having a principal place of business in New
York in the Southern District of New York and a usual place of
business in the Commonwealth of Massachusetts at Buzzard's Bay,
and was authorized under the terms of its charter to construct, own,
maintain and operate a ship canal for the passage of vessels and

water craft between Buzzard's Bay and Barnstable Bay in said District of Massachusetts.

Third. That, pursuant to said act, said canal was constructed as a tide water canal and has been owned, maintained, managed and operated as such by the respondent, and was at the time of the accidents hereinafter mentioned being so maintained and operated.

Fourth. That, prior to and including the date of the accidents hereinafter referred to, the respondent represented said canal to be in a fit, safe and proper condition, suitable for the passage of self-propelled vessels, both loaded and light, of the type and draft of said steamer Bay Port, and to have a depth at mean low water of 25 feet, and solicited, prior to and including said times, 109 said vessels to pass through said canal, in consideration of tolls prescribed by the respondent, and offered to maintain and furnish to said vessels proper tug assistance and pilotage.

Fifth. Pursuant to the aforesaid representation, solicitation and offer of the respondent, and in reliance on the same, the libellant, at about noon of December 13, 1916, applied for passage through said canal for its steamer Bay Port, including the services of respondent's pilot and proper tug assistance by respondent. At said time said steamer was off Wing's Neck, Buzzard's Bay, loaded with about twenty-three hundred ninety-three (2,393) tons of coal, was drawing eighteen feet two inches of water, and was on a voyage from Newport News, in the District of Virginia, to Weymouth, in the District of Massachusetts. In response to said application the tug Dalzelline, which was in respondent's employ and the officers and crew of which were agents or servants of the respondent, proceeded to said steamer Bay Port with pilot George G. Rochester, a servant or agent of the respondent. Upon arriving at said steamer said pilot Rochester went on board of her, took command and so remained until and including the happening of the accident hereinafter described. Said tug proceeded ahead of said steamer with a short hawser leading to the latter's bow, and under the directions of said pilot the Bay Port assisted said tug with her engines. In the aforesaid manner said steamer entered said canal and proceeded against a strong head tide toward the Cape Cod Bay entrance thereof under the charge of said pilot.

When said steamer had proceeded part way through said canal, and while she was steered in accordance with the instructions of said pilot, she sheered to starboard and struck the south bank of said canal to the eastward of Bourne Highway Bridge at about 2.15 p. m.

As soon as said steamer struck said bank distress signals were blown, and in response thereto the tugs Hazelton and John C. Stuart came to the assistance of said steamer, and, together with said tug Dalzelline, endeavored to free said steamer from said bank, but said steamer remained fast aground until the following day.

110 Although said steamer kept her pumps going continuously, she partly filled, and as she was resting in a dangerous position

on the sloping bank of said canal, T. A. Scott Company, Inc., a wrecking corporation, was at once engaged by the libellant to float said steamer.

Early on the morning of December 14, 1916, an examination was made by a diver, and a hole and a crack in said steamer's bottom plating were plugged. Thereafter the steamer's pumps gained on the water in the hold and at about 10.15 a. m. of said date, or about four and a half hours before high water, said steamer suddenly left the bottom and commenced to drift to the eastward with the tide. Pilot William Lewis, a servant or agent of the respondent, thereupon proceeded to complete the passage through the canal which had been interrupted by the stranding above mentioned. Said tug Dalzelline ran a short hawser from the bow of said steamer and took her in tow, assisted by the engines of the steamer, which were started under the directions of said pilot William Lewis.

After proceeding about a mile and a half to the eastward, and while she was steered in accordance with the instructions of said pilot, said steamer sheered to port and struck the northern bank of said canal. Her stern then swung until it struck the southerly bank, which released her bow from the northerly bank, and said steamer then drifted on for one or two lengths until her stern took bottom near the southerly bank. During all of the aforesaid times said steamer Bay Port was under the charge of said pilots Rochester and William Lewis, or one of them, and of said tug or tugs under the direction of said pilot or pilots, and all orders given by said pilots or either of them were promptly executed by the master, officers and crew of said steamer Bay Port.

Sixth. Subsequently a small part of the equipment of said steamer was salvaged and efforts were made by libellant, without success, to raise said steamer. She was then abandoned to the respondent as a total loss and was by it blown up.

Seventh. That by reason of said groundings and the damages thereby caused to said steamer Bay Port the latter became,
111 with her stores, a total loss, amounting together with the loss of freight to about three hundred and six thousand dollars (\$306,000).

Eighth. That the groundings and damages sustained by the said steamer Bay Port as aforesaid, the expense to which the libellant has been put and the loss of freight were in no respect caused by any fault or negligence on the part of the libellant, its servants or agents, but were caused wholly by the fault and negligence of the respondent, its servant or servants, agent or agents, in the following respects, among others:

1. In representing said canal to be safe for passage by vessels of the type and draft of said steamer Bay Port when it was not safe.

2. In representing that there were twenty-five feet of water at mean low water in the channel of said canal when there was not that depth.

3. In permitting said canal to remain in an unsafe, dangerous and unfit condition by reason of the presence of shoals and/or rocks and/or other obstructions, which condition was known to the respondent or which, by the exercise of reasonable diligence, it could have ascertained.

4. In allowing said steamer Bay Port to navigate said canal when the latter was in places too shallow and/or rocky to permit safely said navigation.

5. In failing to dredge said canal when the respondent knew or should have known of shoalings therein.

6. In allowing vessels of great draft to pass through said canal at high speed, causing the sand to be drawn out from under the rip-rap into the canal and with the swift tidal currents make up shoals, which fact was well known to the respondent, and by reason of which the said steamer Bay Port could not control her movements.

7. In negligently permitting a so-called "knuckle" to exist making off the north bank of said canal near the point where the first grounding occurred, causing a swirl which rendered navigation at said place dangerous and caused said steamer Bay Port to sheer.

8. In negligently permitting a shoal to exist in the channel of said canal near the point where the second grounding occurred, in consequence whereof said steamer sheered.

112 9. In negligently failing to provide said canal with suitable dolphins or other means of making vessels fast.

10. In negligently piloting, directing and taking said steamer through said canal in the manner, at the time and under the conditions existing on each occasion of grounding.

11. In attempting to take said steamer Bay Port through said canal with an insufficient number of and improperly placed tugs.

12. In constructing, maintaining and operating said canal with sloping banks faced with rip-rap, without proper means of protection for vessels passing through said canal.

13. In negligently failing to mark by buoys or other distinguishing marks shoals, rocks or other obstructions in said canal.

14. And in other respects to be shown at the trial.

Ninth. That all and singular the premises are true and within the admiralty and maritime jurisdiction of this Honorable Court.

Wherefore the libellant prays that process in due form of law, according to the course of this Honorable Court in causes of admiralty and maritime jurisdiction, may issue against said Boston, Cape Cod & New York Canal Company, and that it may be ordered to appear before this court on such day as the court may direct and then and there answer under oath to all and singular the matters

aforesaid, and that this Honorable Court may be pleased to decree the payment of damages sustained by the libellant as aforesaid, with interest and costs, and that the libellant may have such other and further relief in the premises as it may be entitled to receive.

WHITE OAK TRANSPORTATION
COMPANY,
By GEORGE HAWLEY,
President and General Manager.

BLODGETT, JONES, BURNHAM & BINGHAM,
Proctors for Libellant.

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Boston, May 17, 1917.

Personally appeared the above-named George Hawley and made oath that he is president and general manager of White Oak Transportation Company, that he has read the foregoing libel, 113 and that the allegations and statements therein contained are true to the best of his knowledge, information and belief.

Before me,

FOYE M. MURPHY,
Notary Public.

[SEAL.]

This cause was thence continued to the June Term, A. D. 1917, when, to wit, July 23, 1917, the following Answer was filed:

Answer as Amended.

[Filed July 23, 1917; Amended by Consent November 26, 1917.]

To the Honorable James M. Morton, Jr., Judge of the District Court of the United States within and for the District of Massachusetts:

The answer of the Boston, Cape Cod & New York Canal Company, a corporation duly organized and existing under the laws of the Commonwealth of Massachusetts, to the libel of the White Oak Transportation Company, alleges and articulately propounds as follows:

1. As to the allegations contained in section 1 of the libel, the defendant admits that the libellant was and is a corporation organized under the laws of Maine and having a principal place of business in Boston and was, at the time of the events referred to in the libel, the owner of the steamship Bay Port, as alleged in said article. The defendant denies that at the time mentioned in said article said steamship was tight, staunch, strong, properly manned, equipped or supplied or was in a seaworthy condition. The defendant is ignorant as to the dimensions or horse-power of said steamship and as to the ownership of the stores on board the same and as to the right to the freight earned by her, and leaves the libellant to prove, if material, the allegations with respect to those matters contained in said article.

2. As to the allegations contained in section 2 of the libel, the defendant admits the same, except that it denies that its principal place of business is in New York.

3. As to the allegations contained in section 3 of the libel, the defendant admits the same.

114 4. As to the allegations contained in section 4 of the libel, the defendant admits that it represented said canal to be in a fit, safe and proper condition, suitable for the passage of such self-propelled vessels, both loaded and light, as were in a proper and seaworthy condition, properly loaded, manned and equipped with proper steering and handling apparatus, but denies that said steamer Bay Port was in such condition; the respondent further denies that it offered to maintain or furnish tug assistance or pilotage to vessels passing through the canal.

5. As to the allegations contained in section 5 of the libel, the defendant admits the allegations respecting the libellant's application for passage through the Cape Cod Canal for the Bay Port and respecting her cargo at that time, except that it denies that said application included tug assistance or the services of a pilot or that said application was made in reliance upon any offer by the defendant to furnish tug assistance or pilotage and except that it is ignorant as to the draft of the Bay Port at the time in question and as to the voyage upon which she was then engaged, and leaves the libellant to prove its allegations respecting said raft and voyage, if material.

As to the narrative contained in said article purporting to set out the course of events subsequent to said application, the defendant answers as follows:

(a) It denies that the tug Dalzelline was in its employ and denies that her officers or crew were its agents or servants and denies that George G. Rochester was its servant or agent.

(b) It denies that the Dalzelline proceeded to the Bay Port or took her in tow in consequence of any application to the defendant or that said Rochester went on board of the Bay Port or took any part in navigating her in consequence of any such application.

(c) It denies that, in her progress through the canal, the Bay Port proceeded against a strong head tide.

(d) It is ignorant as to the allegation that the Bay Port, after striking the bank of the canal for the first time, rested in a dangerous position, and leaves the libellant to prove the same, if material.

115 (e) It is ignorant as to the allegation that a crack in the bottom plating of the Bay Port was plugged by a diver, and leaves the libellant to prove the same, if material.

(f) It is ignorant as to the allegation that on the morning of December 14, 1916, the Bay Port's pumps gained on the water in the hold, and leaves the libellant to prove the same if material.

(g) It denies that William Lewis was its agent or servant, and denies that he was at any time in charge of the Bay Port or that he at any time assumed to do more than to render such assistance as he could to the captain of the Bay Port in the emergency which arose through the negligence of The T. A. Scott Company, Inc., in failing properly to make the Bay Port fast to the bank.

(h) It denies that the Bay Port was at any time after she first struck the bank of the canal in charge of said Rochester, and further says that he was not present at the time the Bay Port slid off the bank after first striking the same.

(i) It denies that the Bay Port was at any time after she first struck the bank of the canal in charge of the tug Dalzelline, or of any other tug or tugs.

(j) It admits the other allegations contained in said article respecting the course of events subsequent to the libellant's application for passage for the Bay Port through the canal.

6. As to the allegations contained in section 6 of the libel, the defendant admits the same, but says that the libellant's efforts to raise the Bay Port were not made seasonably or with due diligence.

7. As to the allegations contained in section 7 of the libel, the defendant denies the same.

8. As to the allegations contained in section 8 of the libel, the defendant denies the same.

9. As to the allegations contained in section 9 of the libel, the defendant denies that all and singular the premises are true, but admits the admiralty and maritime jurisdiction of this Honorable Court.

10. Further answering the defendant says that the true facts with reference to the matters set out in the libel are as follows:

On December 13, 1916, the libellant was engaged in the operation of freight-carrying steamers, one of which was the Bay Port, 116 and, on said day, applied at the Buzzard's Bay entrance of the defendant's canal for passage for the Bay Port with a cargo of about 2,393 tons of coal, the Bay Port being officered and manned by employees of the libellant, who in all matters hereinafter referred to acted as the agents and servants of the libellant, and the libellant thereby represented that the Bay Port was in all respects seaworthy and in a fit condition to navigate the canal, but, at the time said application was made, the Bay Port was not, in fact, in a fit condition to navigate the canal, in that she was difficult to control and steer and was apt to become unmanageable and fail to answer her helm. This unfit condition was known, or should have been known, to the libellant, but the defendant did not know of such unfit condition and had no means of knowing the same.

Before the Bay Port was permitted by the defendant to enter the canal, the libellant, by its agent, H. W. Hammett, captain of the Bay Port, signed an agreement with the defendant to conform to the

laws of the United States and of the Commonwealth of Massachusetts pertaining to marine navigation and to all rules and regulations of the defendant governing the use of the canal.

In consequence of the libellant's said application and agreement, the defendant, for tolls on that behalf, gave the Bay Port permission to navigate said canal, and shortly after noon on December 13, 1916, she entered the canal under the charge of George G. Rochester of the Cape Pilot Association, a pilot licensed by the United States Government, and assisted by the tug Dalzelline of The Cape Towing Corporation, a corporation organized under the laws of Delaware, which was out ahead with a hawser on the Bay Port's bow. When the Bay Port reached a point a short distance west of Bournedale, she suddenly became unmanageable and took a quick sheer to starboard. All proper steps were taken to check the sheer, and to enable her to recover her course, but the Bay Port, nevertheless, struck the south bank and stove one small hole in her starboard side forward of midships. The tugs John C. Stuart and Hazelton responded to a call for assistance and an attempt was made to get siphons into the Bay Port,

which attempt failed owing to the absence of manholes or
117 small hatches into which the syphons might be introduced.

The Bay Port remained with her bilge resting on the south bank at the point at which she struck.

Early that evening Captain Joseph Lewis of The T. A. Scott Company, Inc., took charge of the Bay Port on behalf of the libellant, with the object of floating and removing her from the canal, and the tugs Dalzelline, John C. Stuart and Hazelton of the Cape Towing Corporation, which had remained by the Bay Port became, together with their crews, subject to his orders.

Early on the following morning, December 14, 1916, the Bay Port was examined by a diver under the orders of Captain Joseph Lewis acting on behalf of the libellant, and the hole in her starboard side plugged up and the leak checked.

Later on the same morning, while the Bay Port was still in the charge of Captain Joseph Lewis on behalf of the libellant, she moved off the bank, to which, by reason of the defendant's negligence, she had not been made fast. At that time the tugs Dalzelline, John C. Stuart and Hazelton were still by the Bay Port, subject to Captain Joseph Lewis' orders, but, through the negligence of the defendant, the bows of these tugs were turned toward the west and their engines not running. Captain Joseph Lewis at that time was on the lighter Salvor of The T. A. Scott Company, Inc., which by his orders had been brought alongside the Bay Port, and was engaged in superintending the rigging of coal buckets by the defendant's agents on the Salvor to remove the Bay Port's cargo. Owing to the defendant's failure to take proper precautions to hold the Bay Port by the bank, or to make suitable preparations to conduct her through the canal, she began to float eastward with the tide. In this emergency William Lewis of the Cape Pilot Association, a pilot licensed by the United States Government, stepped from the Hazelton on board the Bay Port. Under his orders the captain of the Bay Port started his engines and with a hard-a-port wheel straightened out the Bay Port, which was drifting broadside

and toward the north bank. The Dalzelline very quickly got a hawser on her bow. After she had moved about half a mile, and just as the Hazelton caught up with her, she sheered to port. Proper orders were given to check the sheer, but the Bay Port nevertheless struck on the north bank. Her stern swung to the south bank and her bow away from the north bank, and she then sank diagonally across the canal with her stern on the south bank.

11. Any damage to the libellant arising out of the aforesaid accidents was caused solely by the negligence of the libellant in the following respects, among others:

(a) In causing the Bay Port to enter the canal when she was very difficult to steer and control and was apt to become unmanageable and to fail to answer her helm, which fact was known to the libellant or which reasonably should have been known to it.

(b) In attempting to navigate the canal with a steamer which was very difficult to steer and control and was apt to become unmanageable and to fail to answer her helm, which fact was known to the libellant, or which reasonably should have been known to it.

(c) In attempting to navigate the canal with a steamer which was difficult to steer and control and which was not provided with manholes or small hatches on the deck into which siphons might be introduced in case of emergency.

(d) In neglecting properly to care for the Bay Port while she was resting on the bank subsequent to the accident of December 13th, and in negligently suffering her to slide off the bank at a time when the libellant was not prepared to complete the navigation of the canal by the Bay Port, as a result of which negligence she sank in the channel.

(e) In negligently permitting the Bay Port, subsequent to the accident of December 13th, to become afloat in the canal in an unsafe condition for navigation and in negligently failing to be prepared to complete the passage through the canal by the Bay Port, as a result of which negligence she sank in the channel.

(f) In neglecting to remove the Bay Port from her sunken position in the canal, though repeatedly requested by the defendant so to do, and allowing the Bay Port to remain to be removed by the defendant.

(g) And in other respects as will appear at the trial.

12. All and singular the premises are true and within the admiralty and maritime jurisdiction of this Honorable Court.

119 The defendant therefore prays that the libel herein be dismissed with costs.

BOSTON, CAPE COD & NEW YORK
CANAL COMPANY,
By AUGUST BELMONT.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

July 23, 1917.

Personally appeared August Belmont and made oath that he is president of the Boston, Cape Cod & New York Canal Company, and that the statements contained in the foregoing answer are true to the best of his knowledge, information and belief, before me.

[SEAL.]

EDWARD J. ABLITZER,
Notary Public.

STOREY, THORNDIKE, PALMER & DODGE,
Proctors for Defendant.

This cause was thence continued from term to term to the December Term, A. D. 1917, when, to wit, January 26, 1918, the following Motion was filed:

Motion by Respondent for Leave to File Petition under Rule 59.

[Filed January 26, 1918.]

The respondent respectfully moves this court for leave to present its petition under Rule 59 in Admiralty, praying that process be issued against The T. A. Scott Company, Inc., a corporation duly organized by law, and having a usual place of business in Boston, in said district.

BOSTON, CAPE COD & NEW YORK
 CANAL COMPANY,

By Its Proctors, CURRIER, YOUNG & PILLSBURY.

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Boston, January 25, 1918.

Then personally appeared Thomas H. Mahoney, of counsel for the respondent, and made oath that notice of the within motion was given to Park & Mattison, 79 Wall Street, New York City, 120 proctors for The T. A. Scott Company, Inc., by mailing post-paid notice of said motion and a copy thereof to said Park & Mattison, 79 Wall Street, New York City, in time to be received on January 26, 1918, to the effect that said motion would be made on Monday, February 4, 1918, at 2 p. m., before me,

[SEAL.]

ARTHUR V. GRIMES,
Notary Public.

At the same term, to wit, February 4, 1918, the following Petition was filed:

Petition to Bring in the T. A. Scott Company, Inc., under Supreme Court Rule 59.

[Filed by Leave of Court February 4, 1918.]

To the Honorable James M. Morton, Jr., Judge of the District Court of the United States within and for the District of Massachusetts:

Petition of the Boston, Cape Cod & New York Canal Company, a corporation duly organized under the laws of the Commonwealth of Massachusetts, against The T. A. Scott Company, Inc., a corporation duly organized under the laws of the State of Connecticut, and having a usual place of business in Boston, in the District of Massachusetts; and thereupon the respondent alleges as follows:

1. The respondent on December 13, 1916, and for some time prior thereto, maintained and managed a navigable tide water ship canal for the passage of vessels and water craft of all kinds for tolls between Buzzard's Bay, Cape Cod Bay and the said District of Massachusetts, and still maintains the same.

2. On December 13, 1916, in the early afternoon, the steamer Bay Port, owned and operated by the libellant, a corporation organized under the laws of the State of Maine, while attempting to pass eastward through the Cape Cod Canal struck on the south bank a short distance west of Bourndale. As a result, one small hole was stove in her starboard side and the Bay Port rested with her bilge on the south bank. On said December 13, 1916, in the early evening, said T. A. Scott Company, Inc., through its agent, Captain Joseph Lewis, at the request of the owners of the Bay Port, took charge of said ship with the object of floating and removing her from the canal. The tugs Dalzelline, Hazelton and John C. Stuart were subject to the direction and control of said T. A. Scott Company, Inc.

In the morning of December 14, 1916, while the Bay Port was still in charge of said Captain Joseph Lewis on behalf of the said T. A. Scott Company, Inc., said steamer moved off the bank, to which she had not been made fast. At that time the tugs hereinbefore named were still by the Bay Port, subject to the orders of said Captain Joseph Lewis, but the bows of said tugs were turned towards the west and their engines were not running. The Bay Port began to float eastward with the tide. The tug Dalzelline got a hawser on the bow of the Bay Port after said Bay Port had moved about a quarter of a mile. The Bay Port sheered to port and struck on the north bank, her stern swinging to the south bank and her bow away from the north bank. She then sank diagonally across the canal with her stern on the south bank. Said Bay Port was subsequently blown up to remove the obstruction from the canal.

3. Said sinking and destruction were not caused or contributed to by any negligence on the part of the petitioner or its agents,

servants or employees, but if caused by the negligence of anybody other than of the libellant, its agents and servants, were caused by the negligence of the said T. A. Scott Company, Inc., its agents, servants and employees, in the following respects, among others: in that the Bay Port had not been made fast to the bank after she had struck; in that the tugs were headed west without their engines running at the time the Bay Port floated; in that The T. A. Scott Company, Inc., through its agents and servants, failed to take proper precautions to hold the Bay Port to the bank or to make suitable preparations to conduct the Bay Port through the canal after she floated.

4. On or about the seventeenth day of May, 1917, the said White Oak Transportation Company filed a libel and commenced a suit in this court against your petitioner only for damages alleged to have been sustained by the said sinking and destruction of the Bay Port, to which your petitioner duly made answer, and your petitioner alleges that the said T. A. Scott Company, Inc., ought to be proceeded against for said damages in the same suit as your petitioner.

5. The said T. A. Scott Company, Inc., is within this district and within the jurisdiction of this court.

6. All and singular the premises are true and within the jurisdiction of the United States and this Honorable Court.

Wherefore your petitioner prays that process may issue according to the practice of this court and the rules of the Supreme Court in admiralty against T. A. Scott Company, Inc., to the end that said T. A. Scott Company, Inc., may be proceeded against in this suit for the damage alleged to have been sustained by the libellant as if said T. A. Scott Company, Inc., had been originally proceeded against herein, that the libel against your petitioner be dismissed, and that the petitioner may have such other or further relief as may be proper.

BOSTON, CAPE COD & NEW YORK
CANAL COMPANY,
By H. P. WILSON,
Vice-President.

CITY, COUNTY AND STATE OF NEW YORK:

November 28, 1917.

Then personally appeared H. P. Wilson, vice-president of the Boston, Cape Cod & New York Canal Company, and made oath that the above statements subscribed by him are true to the best of his knowledge, information and belief, before me,

HARRY J. DIETRICH,
Notary Public.

On the said fourth day of February, the foregoing petition was allowed by the court.

On the first day of March, A. D. 1918, the following Petition to Intervene was filed by consent by the Northern Coal Company:

Petition of Northern Coal Company to Intervene.

[Filed by Consent March 1, 1918.]

The Northern Coal Company, a corporation organized under the laws of Maine, and having a usual place of business in Boston in said District of Massachusetts, brings this its petition to intervene in the libel of the White Oak Transportation Company v. 123 Boston, Cape Cod & New York Canal Company, heretofore filed in this court and being No. 1555 on the docket of said court, for damages suffered by your petitioner in connection with the loss of the steamer Bay Port, as set forth in said libel, and thereupon your petitioner alleges and articulately propounds as follows, to wit:

First. That prior to and on the thirteenth day of December, 1916, and at the time of the happenings to the steamer Bay Port referred to in said libel and at the time of the stranding and loss of said steamer in said canal, your petitioner was the owner of the cargo of about twenty-three hundred ninety-seven tons of coal on said steamer on the voyage referred to in said libel from Newport News in the District of Virginia to Weymouth in the District of Massachusetts.

Second. That by reason of said groundings and the damages thereby caused to said steamer said cargo of coal became a total loss amounting to about \$12,464, by reason of which your petitioner has suffered loss and damage to that amount.

Third. That the groundings and damages and loss of said steamer Bay Port and of said cargo were in no respect caused by any fault or negligence on the part of your petitioner, its servants or agents, or on the part of the libellant, its servants or agents, but were caused wholly by the fault and negligence of the respondent, the Boston, Cape Cod & New York Canal Company, its servants or agents, in the following respects, among others:

1. In representing said canal to be safe for passage by vessels of the type and draft of said steamer Bay Port, when it was not safe.

2. In representing that there were twenty-five feet of water at mean low water in the channel of said canal, when there was not that depth.

3. In permitting said canal to remain in an unsafe, dangerous and unfit condition by reason of the presence of shoals and/or rocks and/or other obstructions, which condition was known to the respondent or which by the exercise of reasonable diligence, it could have ascertained.

124 4. In allowing said steamer Bay Port to navigate said canal when the latter was in places too shallow and/or rocky to permit safely said navigation.

5. In failing to dredge said canal when the respondent knew or should have known of shoalings therein.

6. In allowing vessels of great draft to pass through said canal at high speed, causing the sand to be drawn out from under the rip-rap into the canal and with the swift tidal currents make up shoals, which fact was well known to the respondent and by reason of which said steamer Bay Port could not control her movements.

7. In negligently permitting a so-called "knuckle" to exist making off the north bank of said canal near the point where the first grounding occurred, causing a swirl which rendered navigation at said place dangerous and caused said steamer Bay Port to sheer.

8. In negligently permitting a shoal to exist in the channel of said canal near the point where the second grounding occurred, in consequence whereof said steamer sheered.

9. In negligently failing to provide said canal with suitable dolphins or other means of making vessels fast.

10. In negligently piloting, directing and taking said steamer through said canal in the manner, at the time and under the conditions existing on each occasion of grounding.

11. In attempting to take said steamer Bay Port through said canal with an insufficient number of and improperly placed tugs.

12. In constructing, maintaining and operating said canal with sloping banks faced with rip-rap, without proper means of protection for vessels passing through said canal.

13. In negligently failing to mark by buoys or other distinguishing marks shoals, rocks or other obstructions in said canal.

14. And in other respects to be shown at the trial.

Fourth. That all and singular the premises are true and within the admiralty and maritime jurisdiction of this Honorable Court.

Wherefore your petitioner prays that it may be allowed to intervene in said libel of the White Oak Transportation Company v. Boston, Cape Cod & New York Canal Company, and that this Honorable Court may be pleased to decree the payment of the damages sustained by the petitioner as aforesaid, with interest and
125 costs, and for such other and further relief in the premises as it may be entitled to receive.

NORTHERN COAL COMPANY,
By BORDEN CORVEL,
President.

COMMONWEALTH OF MASSACHUSETTS,

Suffolk, ss:

Boston, February 16, 1918.

Personally appeared Borden Covel and made oath that he is the president of the Northern Coal Company, that he has read the foregoing statements by him subscribed and that the same are true to the best of his knowledge and belief, before me,

[SEAL.]

FREDERICK FOSTER,

Notary Public.

On the seventh day of said March, the following Answer was filed:

Answer to Intervening Petition of Northern Coal Company.

[Filed March 7, 1918.]

To the Honorable James M. Morton, Jr., Judge of the District Court of the United States within and for the District of Massachusetts:

The answer of the Boston, Cape Cod & New York Canal Company, a corporation duly organized and existing under the laws of the Commonwealth of Massachusetts, to the intervening petition of the Northern Coal Company, alleges and articulately propounds as follows:

1. As to the allegations contained in section 1 of the intervening petition the respondent is ignorant and leaves the petitioner to prove, if material, the allegations with respect to those matters contained in said article.

2. As to the allegations contained in section 2 of the intervening petition the respondent is ignorant and leaves the petitioner to prove, if material, the allegations with respect to those matters contained in said article.

3. As to the allegations contained in section 3 of the intervening petition the respondent admits that the groundings, damage
126 and loss of said steamer Bay Port and of the cargo were in no respect caused by any fault or negligence on the part of the petitioner, its servants or agents, but denies that said groundings, damage and loss were not caused by the libellant, its agents or servants, and further denies that such groundings, damage and loss were caused in any way by the fault and negligence of the respondent, its servants or agents. The respondent further denies the remaining allegations contained in section 3 of the intervening petition.

4. As to the allegations contained in section 4 of the intervening petition the respondent denies that all and singular the premises are true, but admits the admiralty and maritime jurisdiction of this Honorable Court.

5. Further answering, the respondent says that the true facts with reference to the matters set out in the libel and said intervening petition are as follows:

On December 13, 1916, the libellant was engaged in the operation of freight-carrying steamers, one of which was the Bay Port, and, on said day, applied at the Buzzard's Bay entrance of the respondent's canal for passage for the Bay Port with a cargo of about 2,393 tons of coal, the Bay Port being officered and manned by employees of the libellants who in all matters hereinafter referred to acted as the agents and servants of the libellant, and the libellant thereby represented that the Bay Port was in all respects seaworthy and in a fit condition to navigate the canal, but, at the time said application was made the Bay Port was not, in fact, in a fit condition to navigate the canal, in that she was difficult to control and steer and was apt to become unmanageable and fail to answer her helm. This unfit condition was known, or should have been known, to the libellant, but the respondent did not know of such unfit condition and had no means of knowing the same.

Before the Bay Port was permitted by the respondent to enter the canal, the libellant, by its agent, H. W. Hammett, captain of the Bay Port, signed an agreement with the respondent to conform to the laws of the United States and of the Commonwealth of
127 Massachusetts pertaining to marine navigation and to all rules and regulations of the respondent governing the use of the canal.

In consequence of the libellant's said application and agreement, the respondent, for tolls on that behalf, gave the Bay Port permission to navigate said canal, and shortly after noon on December 13, 1916, she entered the canal under the charge of George G. Rochester of the Cape Pilot Association, a pilot licensed by the United States Government, and assisted by the tug Dalzelline of the Cape Towing Corporation, a corporation organized under the laws of Delaware, which was out ahead with a hawser on the Bay Port's bow. When the Bay Port reached a point a short distance west of Bourne-dale, she suddenly became unmanageable and took a quick sheer to starboard. All proper steps were taken to check the sheer, and to enable her to recover her course, but the Bay Port, nevertheless, struck the south bank and stove one small hole in her starboard side forward of midships. The tugs John C. Stuart and Hazelton responded to a call for assistance and an attempt was made to get siphons into the Bay Port, which attempt failed owing to the absence of manholes or small hatches into which the siphons might be introduced. The Bay Port remained with her bilge resting on the south bank at the point at which she struck.

Early that evening Captain Joseph Lewis of The T. A. Scott Company, Inc., took charge of the Bay Port on behalf of the libellant, with the object of floating and removing her from the canal, and the tugs Dalzelline, John C. Stuart and Hazelton of the Cape Towing Corporation, which had remained by the Bay Port, became, together with their crews, subject to his orders.

Early on the following morning, December 14, 1916, the Bay Port

was examined by a diver under the orders of Captain Joseph Lewis acting on behalf of the libellant, and the hole in her starboard side plugged up and the leak checked.

Later on the same morning, while the Bay Port was still in the charge of Captain Joseph Lewis on behalf of the libellant, she moved off the bank, to which by reason of the libellant's negligence she had not been made fast. At that time the tugs Dalzelline, 128 John C. Stuart and Hazelton were still by the Bay Port, subject to Captain Joseph Lewis' orders, but, through the negligence of the libellant, the bows of these tugs were turned toward the west and their engines not running. Captain Joseph Lewis at that time was on the lighter Salvor of The T. A. Scott Company, Inc., which by his orders had been brought alongside the Bay Port, and was engaged in superintending the rigging of coal buckets by the libellant's agents on the Salvor to remove the Bay Port's cargo. Owing to the libellant's failure to take proper precautions to hold the Bay Port by the bank, or to make suitable preparations to conduct her through the canal, she began to float eastward with the tide. In this emergency William Lewis, of the Cape Pilot Association, a pilot licensed by the United States Government, stepped from the Hazelton on board the Bay Port. Under his orders the captain of the Bay Port started his engines and with a hard-a-port wheel straightened out the Bay Port, which was drifting broadside and toward the north bank. The Dalzelline very quickly got a hawser on her bow. After she had moved about half a mile, and just as the Hazelton caught up with her, she steered to port. Proper orders were given to check the sheer, but the Bay Port nevertheless struck on the north bank. Her stern swung to the south bank and her bow away from the north bank, and she then sank diagonally across the canal with her stern on the south bank.

6. Any damage to the libellant arising out of the aforesaid accidents was caused solely by the negligence of the libellant in the following respects, among others:

(a) In causing the Bay Port to enter the canal when she was very difficult to steer and control and was apt to become unmanageable and to fail to answer her helm, which fact was known to the libellant or which reasonably should have been known to it;

(b) In attempting to navigate the canal with a steamer which was very difficult to steer and control and was apt to become unmanageable and to fail to answer her helm, which fact was known to the libellant or which reasonably should have been known to it;

(c) In attempting to navigate the canal with a steamer which was difficult to steer and control, and which was not provided 129 with manholes or small hatches on the deck into which siphons might be introduced in case of emergency;

(d) In neglecting properly to care for the Bay Port while she was resting on the bank subsequent to the accident of December 13, and in negligently suffering her to slide off the bank at a time when the

libellant was not prepared to complete the navigation of the canal by the Bay Port, as a result of which negligence she sank in the channel;

(e) In negligently permitting the Bay Port, subsequent to the accident of December 13, to become afloat in the canal in an unsafe condition for navigation and in negligently failing to be prepared to complete the passage through the canal by the Bay Port, as a result of which negligence she sank in the channel;

(f) In neglecting to remove the Bay Port from her sunken position in the canal, though repeatedly requested by the respondent so to do, and allowing the Bay Port to remain to be removed by the respondent.

(g) And in other respects as will appear at the trial.

7. All and singular the premises are true and within the admiralty and maritime jurisdiction of this Honorable Court.

The respondent therefore prays that the intervening petition herein be dismissed with costs.

BOSTON, CAPE COD & NEW YORK
CANAL COMPANY,

By H. P. WILSON,
Vice-President.

UNITED STATES OF AMERICA,

Southern District of New York, ss:

March 5, 1918.

Personally appeared H. P. Wilson and made oath that he is vice-president of the Boston, Cape Cod & New York Canal Company, and that the statements contained in the foregoing answer are true to the best of his knowledge, information and belief, before me,

[SEAL.]

HARRY J. DIETRICH,
Notary Public.

CURRIER, YOUNG & PILLSBURY,
Proctors for Respondent.

130 On the eleventh day of March, A. D. 1918, the following Stipulation for Costs was filed by T. A. Scott Company, Inc.:

Stipulation for Costs.

[Filed March 11, 1918.]

Whereas a libel was filed in this court on the seventeenth day of May, 1917, by White Oak Transportation Company against Boston, Cape Cod & New York Canal Company and The T. A. Scott Company, Inc., was brought in by petition under the 59th Rule in Admiralty, for the reasons and causes in the said libel mentioned; and the parties hereto hereby consenting that in case of default or contumacy on the part of The T. A. Scott Company, Inc., respondent, or

its surety, execution for the sum of two hundred and fifty dollars may issue against their goods, chattels and lands;

Now, therefore, it is hereby stipulated and agreed, for the benefit of whom it may concern, that The T. A. Scott Company, Inc., respondent herein, and the stipulators undersigned, Fidelity and Deposit Company of Maryland, shall be and each of them is hereby bound in the sum of two hundred and fifty dollars, conditioned that The T. A. Scott Company, Inc., respondent above named, shall pay all costs and expenses which shall be awarded against it by the final decree of this court, or upon appeal by the appellate court.

THE T. A. SCOTT COMPANY, INC., [SEAL.]

By WILLIAM FONES,
President.

Taken and acknowledged this ninth day of March, 1918, before me,

[SEAL.]

BYRON A. FONES,
Notary Public.

PARK & MATTISON,
Proctors for T. A. Scott Company, Inc.
79 Wall Street, N. Y.

FIDELITY AND DEPOSIT COMPANY
OF MARYLAND, [SEAL.]
By ARTHUR L. FASH,
Resident Vice-President.

Attest:

JOHN H. LAUDER,
Resident Assistant Secretary.

Before

FRANK A. MASON,
Deputy Clerk.

March 11, 1918.

131 On the said eleventh day of March, the following Answer to Libel was filed:

Answer of T. A. Scott Company, Inc., to Libel.

[Filed March 11, 1918.]

To the Honorable James M. Morton, Jr., Judge of the District Court of the United States within and for the District of Massachusetts:

The answer of The T. A. Scott Company, Inc., to the libel of the White Oak Transportation Company, a corporation under the laws of the State of Maine, as owner of the steamer Bay Port, against the Boston, Cape Cod & New York Canal Company, a corporation under the laws of the Commonwealth of Massachusetts, and The T. A. Scott Company, Inc., impleaded under Admiralty Rule 59, in an alleged

cause of damage, civil and maritime, respectfully propounds to this Honorable Court, upon information and belief, as follows:

I. The respondent admits the allegation contained in the first article of said libel relative to its incorporation and place of business, but alleges relative to the remaining allegations contained in the said first article that it has no knowledge or information sufficient to form a belief, and leaves the libellant to introduce proof in support thereof.

II. Respondent admits the allegations contained in the second and third articles of said libel.

III. Respondent admits all the allegations contained in the fifth article of said libel except the statement contained in the second paragraph, middle of page 4 [printed page 110], that at the time the Bay Port suddenly left the bottom and commenced to drift to the eastward with the tide it was about four and a half hours before high water, which is denied.

IV. Respondent admits the allegations contained in the sixth article of said libel.

V. The respondent has no knowledge or information relative to the truth of the allegations contained in the seventh article of said libel, and leaves the libellant to introduce proof in support thereof.

VI. Respondent admits all of the allegations contained in
132 the eighth article of said libel except the paragraph numbered II, which is denied.

VII. Respondent admits the jurisdiction of this Honorable Court, as alleged in the ninth article of said libel, and that all and singular the premises are true as alleged therein, except as hereinbefore denied.

Further answering, upon information and belief, the respondent alleges:

VIII. That at all the times hereinafter mentioned the respondent was a corporation organized and existing under and pursuant to the laws of the State of Connecticut, with its principal office and place of business at New London, State of Connecticut, and that at said times the respondent maintained and kept a wrecking plant at Boston, within the District of Massachusetts, and that the business of the respondent was assisting vessels in distress, bridge and pier building, and generally submarine work of all kind.

IX. On information and belief, on the afternoon of December 13, 1916, Joseph M. Lewis, an employee of the respondent, in charge of a part of respondent's wreckage plant at Boston, was requested by the firm of Crowell & Thurlow, whom the respondent believes to be the operating agents of the steamship Bay Port, to proceed to the canal, which is owned, operated and controlled by the libellant, as the steamer Bay Port, laden with coal, was sunk in said canal. Thereupon the said Captain Lewis proceeded by train from Boston to said canal, arriving at said steamship in the evening of said day. That

the said steamship Bay Port, a so-called whaleback, was upon the southerly or starboard side of said canal, resting with her starboard bilge upon the side thereof, with No. 1, No. 2 and No. 3 holds partly filled with water, and with a list of from ten to eleven degrees to port. All the officers and crew of said steamship were aboard, with steam up on the steamship. The three steamtugs Dalzelline, Hazelton and John C. Stuart were at the wreck, and Joseph Lewis was informed all three steamtugs had been engaged in attempting to pull the Bay Port from the bank into deep water, shortly after the stranding. The

steamship's pump was in operation in an attempt to keep the
133 said holds free from water. Captain Lewis made soundings upon the starboard side of said steamship and then on account of darkness proceeded to the Canal Company's office at the west end of the canal. On the following morning about 4 a. m., Captain Joseph Lewis proceeded to said wreck and with a diver examined the starboard side of said steamship Bay Port, and found just under the turn of the bilge leading into the No. 2 water bottom a small hole and a boulder immediately in front of said hole. The break was about eight inches long and about four inches wide. Captain Lewis was informed that the steamship's pump had been going continuously since the said steamship commenced to leak. Said steamship was about 265 feet long and was reported to be drawing between 18 and 19 feet of water. The hole was plugged, the leak was stopped and the pump of the steamship kept going. The said steamship was laden with coal. The lighter Salvor, owned by the respondent, was alongside of said steamship and Captain Joseph Lewis was on said lighter, with the crew thereof, making preparations to put said lighter in condition to move the cargo in the forward part of said steamship on to the said lighter. At about 10.45 a. m., while Captain Joseph Lewis was on the said lighter Salvor, the bottom of the said steamship crushed the bank on which her starboard side was resting and a large quantity of the water having been pumped from her forward holds she slid off the bank into the deeper water of the canal. The steamship was heading to the eastward. Thereupon the canal pilot William T. Lewis went upon the bridge of the said steamship and assumed command of her navigation, and the steamtug Dalzelline put a line on the bow of said steamship and proceeded ahead of her, assisting in the navigation of said steamship. The Salvor, which had been made fast to the said steamship, disconnected her lines therefrom. The said steamship after proceeding from a mile and a quarter to a mile and a half from the position where she was stranded, toward the eastern end of the canal, again struck the bank of said canal and stranded, where, respondent is informed and believes, she still lies. At the place in the canal where the said steamship was first stranded there was neither dolphins, mooring spiles or
134 any objects to which the said steamship could be made fast, if necessary, and the anchors and chains of said steamship were insufficient to hold the said steamship upon said bank, if the same were desirable.

X. That the stranding of the said steamer Bay Port was not produced or caused by any negligence or carelessness upon the part of the respondent, but was solely produced by the negligence of the petitioner in the following particulars, among others which will be shown at the trial:

(A) That there was an insufficient depth of water in said canal for said steamship to navigate in safety on account of the draught of said steamship, which fact was well known to the petitioner when the said steamship entered said canal.

(B) On account of the passage in said canal by steamships, permitted and encouraged by the petitioner, shoals had been developed in said canal over which the steamship Bay Port could not be navigated in safety, which fact was well known to the petitioner, and that a shoal had developed in said canal a short distance westward from where said steamship Bay Port became stranded over which it was impossible for the said steamship Bay Port to maintain steerageway and control of her movements. That in consequence thereof the said steamship took a sheer and struck the bank of said canal, causing her to strand in said canal.

(C) On account of the passage of deep draught vessels and the swift tidal currents in said canal the supporting rip-raps have bulged outward, the sand from the inside percolating through the same, many boulders have been exposed, and the said canal at the time of the stranding of the said steamship was in consequence thereof innavigable in fact to a steamship of her form of construction and draught of water, all of which facts were known to the petitioner.

(D) The said petitioner on account of the danger attending the navigation of said canal has kept and maintained a large fleet of steamtugs for the purpose of assisting vessels through the canal and to render assistance in case of distress, and at the time of the stranding of said steamship Bay Port the said steamship was under the control and command of the canal pilot in the employ of the petitioner and of a steamtug under the control and direction of the petitioner.

(E) From the time said steamship Bay Port entered the canal until the stranding of said steamship she was under the control and management of the petitioner.

IX. All and singular the premises are true.

Wherefore respondent prays that the said libel as against it may be dismissed with costs.

PARK & MATTISON,
Proctors for Respondent.

No. 97 Wall Street, Manhattan, New York City.

STATE OF CONNECTICUT,
New London County, ss:

William A. Fones, being duly sworn, deposes and says that he is the president of the The T. A. Scott Company, Inc., the respondent herein. That he has read the foregoing answer, knows the contents thereof and that the same is true to the best of deponent's knowledge, information and belief. That the reason why this verification is made by deponent and not by said respondent is that respondent is a corporation of which this deponent is an officer, to wit, its president. That the sources of deponent's information and the grounds of his belief in the premises are statements made to the deponent by the agents and employees of the respondent.

WILLIAM A. FONES.

Sworn to before me this twenty-eighth day of February, 1918.

BYRON A. FONES,

[SEAL.]

Notary Public.

Also on the same day, the following Answer to Petition and Interrogatories were filed:

136 *Answer of T. A. Scott Company, Inc., to Petition of the Boston, Cape Cod & New York Canal Company and Interrogatories by T. A. Scott Company, Inc., to the Boston, Cape Cod & New York Canal Company.*

[Filed March 11, 1918.]

To the Honorable James M. Morton, Jr., Judge of the District Court of the United States within and for the District of Massachusetts:

The answer of The T. A. Scott Company, Inc., to the petition of the Boston, Cape Cod & New York Canal Company, impleading The T. A. Scott Company, Inc., under the 59th Rule in Admiralty, as a party in the libel of the White Oak Transportation Company against the Boston, Cape Cod & New York Transportation Company, in a cause of damage, civil and maritime, respectfully propounds to this Honorable Court, upon information and belief, as follows:

I. Respondent admits the allegations contained in the first article of said petition.

II. Respondent admits the allegations contained in article 2 of said petition that the steamship Bay Port, owned and operated by the libellant, a corporation under the laws of the State of Maine, struck on the south bank of said canal west of Bournedale and as a result one hole was stove in her starboard side, and that her starboard bilge rested upon the south bank of said canal, and on Decem-

ber 13, 1916, Captain Joseph Lewis, employed by the respondent, proceeded to the said Bay Port with the object of floating said steamship. That on the following morning, December 14, 1916, the said steamship moved from said bank and that subsequently the said steamship stranded in said canal and was subsequently blown up, but denies each and every other allegation contained in said article except as hereinbefore specifically admitted and set forth in this the respondent's answer to the petition.

III. Respondent denies each and every allegation contained in the third article of said petition.

IV. Respondent admits, as alleged in the fourth article of
137 said petition, that on or about the seventeenth day of May, 1917, the White Oak Transportation Company filed a libel against the petitioner, as alleged in the fourth article of said petition, but denies each and every other allegation contained in said fourth article.

V. Respondent admits the allegations contained in the fifth article of said petition.

VI. Respondent admits the jurisdiction of this Honorable Court, as alleged in the sixth article of said petition, but denies that all and singular the premises are true as alleged therein, except as hereinbefore specifically admitted.

Further answering said petition respondent alleges:

VII. That at all the times hereinafter mentioned the respondent was a corporation organized and existing under and pursuant to the laws of the State of Connecticut, with its principal office and place of business at New London, State of Connecticut, and that at said times the respondent maintained and kept a wrecking plant at Boston, within the District of Massachusetts, and that the business of the respondent was assisting vessels in distress, bridge and pier building and generally submarine work of all kind.

VIII. On information and belief, on the afternoon of December 13, 1916, Joseph M. Lewis, an employee of the respondent, in charge of a part of respondent's wrecking plant at Boston, was requested by the firm of Crowell & Thurlow, whom the respondent believes to be the operating agents of the steamship Bay Port, to proceed to the canal, which is owned, operated and controlled by the petitioner, as the steamer Bay Port, laden with coal, was sunk in said canal. Thereupon said Captain Lewis proceeded by train from Boston to said canal, arriving at said steamship in the evening of said day. That the said steamship Bay Port, a so-called whaleback, was upon the southerly or starboard side of said canal, resting with her starboard bilge upon the side thereof, with No. 1, No. 2 and No. 3 holds partly filled with water, and with a list of from 10 to 11 degrees to port. All of the officers and crew of said steamship were aboard, with steam up on the steamship. The three steamtugs Dalzelline, Hazelton and John C. Stuart were at the wreck, and

Joseph Lewis was informed all three steamtugs had been engaged in attempting to pull the Bay Port from the bank into deep water, shortly after the stranding. The steamship's pump was in operation in an attempt to keep the said holds free from water. Captain Lewis made soundings upon the starboard side of said steamship and then on account of darkness proceeded to the petitioner's office at the west end of the canal. On the following morning about 4 a. m., Captain Joseph Lewis proceeded to said wreck and with a diver examined the starboard side of said steamship Bay Port, and found just under the turn of the bilge leading into the No. 2 water bottom a small hole and a boulder immediately in front of said hole. The break was about eight inches long and about four inches wide. Captain Lewis was informed that the steamship's pump had been going continuously since the said steamship commenced to leak. Said steamship was about 265 feet long and was reported to be drawing between 18 and 19 feet of water. The hole was plugged, the leak was stopped and the pump of the steamship kept going. The said steamship was laden with coal. The lighter Salvor, owned by the respondent, was alongside of said steamship and Captain Joseph Lewis was on said lighter, with the crew thereof, making preparations to put the said lighter in condition to remove the cargo in the forward part of said steamship on to the said lighter. At about 10.15 a. m., while Captain Joseph Lewis was on the said lighter Salvor, the bottom of the said steamship crushed the bank on which her starboard side was resting and a large quantity of the water having been pumped from her forward holds she slid off the bank into the deeper water of the canal. The steamship was heading to the eastward. Thereupon the canal pilot William T. Lewis went upon the bridge of the said steamship and assumed command of her navigation, and the steamtug Dalzelline put a line on the bow of said steamship and proceeded ahead of her, assisting in the navigation of said steamship. The Salvor, which had been made fast to the said steamship, disconnected her lines therefrom. The said steamship after proceeding from a mile and a quarter to a mile and a half from the position where she was stranded, toward the eastern end of the canal, again struck the bank of said canal and stranded, where, the respondent is informed and believes, she still lies. At the place in the canal where the said steamship was first stranded there was neither dolphins, mooring spiles or any objects to which the said steamship could be made fast, if necessary, and the anchors and chains of said steamship were insufficient to hold the said steamship upon said bank, if the same were desirable.

IX. That the stranding of the said steamship Bay Port was not produced or caused by any negligence or carelessness upon the part of the respondent but was solely produced by the negligence of the petitioner in the following particulars, among others which will be shown at the trial:

(A) In that there was an insufficient depth of water in said canal for said steamship to navigate in safety on account of the draught

of said steamship, which fact was well known to the petitioner when the said steamship entered said canal.

(B) On account of the passage in said canal by steamships, permitted and encouraged by the petitioner, shoals have been developed in said canal over which the steamship Bay Port could not be navigated in safety, which fact was well known to the petitioner, and that a shoal had developed in said canal a short distance westward from where said steamship Bay Port became stranded over which it was impossible for the said steamship Bay Port to maintain steerageway and control of her movements. That in consequence thereof the said steamship took a sheer and struck the bank of said canal, causing her to strand in said canal.

(C) On account of the passage of deep draught vessels and the swift tidal currents in said canal the supporting rip-raps have bulged outward, the sand from the inside percolating through the same, many boulders have been exposed and the said canal at the time of the stranding of the said steamship was in consequence thereof innavigable in fact to a steamship of her form of construction and draught of water, all of which facts were known to the petitioner.

(D) That said petitioner on account of the danger attending the navigation of said canal has kept and maintained a large fleet of steamtugs for the purpose of assisting vessels through the canal and to render assistance in case of distress, and at the time of the stranding of said steamship Bay Port the said steamship was under the control and command of the canal pilot in the employ of the petitioner and of a steamtug under the control and direction of the petitioner.

(E) From the time said steamship Bay Port entered the canal until the stranding of said steamship she was under the control and management of the petitioner.

X. All and singular the premises are true.

Wherefore respondent prays that said petition be dismissed with costs.

PARK & MATTISON.

Proctors for Respondent.

No. 79 Wall Street, Manhattan, New York City.

STATE OF CONNECTICUT,
New London County, ss:

William A. Fones being duly sworn deposes and says that he is the president of The T. A. Scott Company, Inc., the respondent herein. That he has read the foregoing answer, knows the contents thereof and that the same is true to the best of deponent's knowledge, information and belief. That the reason why this verification is made by deponent and not by said respondent is that respondent is

a corporation of which this deponent is an officer, to wit, its president. That the sources of deponent's information and the grounds of his belief in the premises are statements made to the deponent by the agents and employees of the respondent.

WILLIAM A. FONES

Sworn to before me this twenty-eighth day of February, 1918.

[SEAL]

BYRON A. FONES,
Notary Public.

141 *Interrogatories Propounded by the Respondent to the Petitioner, the Boston, Cape Cod & New York Canal Company, to be Answered by it under Oath.*

First. Who are the officers and directors of the Boston, Cape Cod & New York Canal Company, and where is its principal place of business?

Second. Who are the officers and directors of the Cape Towing Corporation, and where is its principal place of business?

Third. From whom do the masters of the steamtugs John C. Stuart, Hazelton and Dalzelline receive their orders in relation to their work in or about the canal?

Fourth. If the answer to Interrogatory 3 refers to any person connected with the Cape Towing Corporation, state what position that person holds with the Boston, Cape Cod & New York Canal Company.

Fifth. State what agreement or arrangement exists between the Boston, Cape Cod & New York Canal Company and the pilots of the so-called Cape Pilot Association relative to their compensation.

Sixth. State from whom the pilots of this so-called Cape Pilot Association receive their orders relative to the pilotage of any vessel through the canal.

Seventh. State if any employee of the Boston, Cape Cod & New York Canal Company holds any office in the Cape Towing Corporation.

Eighth. In whom at the time of the stranding of the steamship Bay Port was the title of the steamtugs John C. Stuart, Hazelton and Dalzelline?

Ninth. If the title of said steamtugs were not in the name of the Cape Towing Corporation, state what arrangements or agreement existed between the libellant and the owners of said steamtugs as to their use in the canal.

PARK & MATTISON,
Proctors for T. A. Scott Company, Inc.

On the fifteenth day of said March the following Answers
142 of the Boston, Cape Cod & New York Canal Company to Interrogatories Propounded by T. A. Scott Company, Inc., were
filed:

Answers to Interrogatories Propounded by T. A. Scott Company, Inc., to the Respondent, Boston, Cape Cod & New York Canal Company.

[Filed March 15, 1918.]

1. Officers: August Belmont, president; H. P. Wilson, 1st vice-president; August Belmont, Jr., 2d vice-president; J. J. Coakley, treasurer; Charles Maass, secretary; William F. Howard, clerk. Directors: August Belmont, F. de C. Sullivan, Charles H. Allen, De Witt C. Flanagan, W. A. Harriman, Francis R. Appleton, L. F. Loree, J. W. Miller, William B. Parsons, F. D. Underwood, H. P. Wilson. Places of business: Boston, Massachusetts, and New York, New York.

2. The officers of the respondent as such officers have no knowledge as to this matter.

3. The officers of the respondent as such officers have no knowledge as to this matter.

4. See answer to Interrogatory 3.

5. The Boston, Cape Cod & New York Canal Company guaranteed to the pilots of the Cape Pilot Association that they would earn a certain amount per year. It has never been called upon to fulfill this guaranty.

6. The officers of the respondent as such officers have no knowledge as to this matter.

7. No employee of the Boston, Cape Cod & New York Canal Company holds any office in the Cape Towing Corporation.

8. The tug John C. Stuart was chartered by the respondent to the Cape Towing Corporation under an agreement dated September 1, 1916, a copy whereof is hereto annexed. The respondent having no interest in or control of the other tugs mentioned, I do not know in whom title was.

9. If the interrogatory is intended to refer to libellant, I do not know. If it is intended to refer to the respondent, the only arrangement for use of tugs was with the Cape Towing Corporation
143 by virtue of an agreement dated September 1, 1916, a copy whereof is hereto annexed.

BOSTON, CAPE COD & NEW YORK
CANAL COMPANY,
By AUGUST BELMONT, JR.,

2d Vice-President.

STATE OF NEW YORK,
City of New York, ss:

March 11, 1918.

Then personally appeared August Belmont, Jr., being the 2d vice-president of Boston, Cape Cod & New York Canal Company, and made oath that the answers above subscribed by him are true to the best of his knowledge and belief, before me,

[SEAL.]

HARRY J. DIETRICH,
Notary Public.

Agreement, made in the City of New York this eighth day of September, 1916, between Cape Towing Corporation, a corporation organized under the laws of the State of Delaware (hereinafter referred to as the "Towing Company"), party of the first part, and Boston, Cape Cod & New York Canal Company, a corporation organized under the laws of the Commonwealth of Massachusetts (hereinafter referred to as the "Canal Company"), party of the second part.

Whereas, a written proposal of the Towing Company to the Canal Company, dated September 1, 1916, relating to the furnishing of certain towage facilities in the Cape Cod Canal upon terms mentioned in said proposal has been duly accepted by the Canal Company, and it is the desire of the parties hereto that all of the terms of said agreement shall be set forth in this instrument and shall be limited by the terms hereof.

Now, therefore, in consideration of One Dollar in hand paid by each party to the other, and of other good and valuable consideration, the receipt whereof is hereby acknowledged, the parties hereto agree as follows:

1. The Canal Company lets to the Towing Company and the Towing Company hires from the Canal Company the steamtug "John C. Stuart," with tackle and appurtenances, for the term and
144 period of one year, commencing from the date of this instrument and upon the following terms:

(a) The Towing Company will pay to the Canal Company as charter price or rental for the use of said vessel the sum of One Thousand Dollars (\$1,000) per month, payable on the last day of each and every month during the term of this agreement.

(b) The Towing Company, at its own sole cost and expense, will provide the vessel with a complete crew, master and engineer and, during the term of this agreement, will maintain said crew, master and engineer, and will pay their wages and salaries and all other expenses of said vessel, including coal and water, and will pay for all broken and worn out parts of the vessel within the hull.

(c) The Towing Company will use and possess said vessel at its own risk. The Canal Company shall be free of all liability in connection therewith, and shall not be liable for damages arising out of accidents to person or property caused by or resulting from the negligence of the master, engineer, or any member of the crew of said vessel, or otherwise.

(d) The Towing Company shall at all times keep said vessel free and clear of and discharged from any and all liens and encumbrances of every kind and nature not existing at the date of this instrument, and shall promptly pay all claims which might result in such liens or encumbrances, and all taxes, dues, fines or charges of every kind which might or could result in a lien or charge against said vessel.

(e) The said vessel shall be insured in such amounts and against such risks as within the reasonable discretion of the Canal Company shall seem advisable and the Towing Company will pay the premiums on all such insurance.

(f) The Towing Company will return the said vessel to the Canal Company at the end of the term of this contract in the same condition as at present, reasonable wear and tear excepted.

2. The Canal Company assigns, transfers and sets over unto the Towing Company all of the right, title and interest of the Canal Company in and to the Tug "Hazelton" and the use thereof acquired under the terms of an agreement dated June 6th, 1916,
145 between the Canal Company and the River & Harbor Transportation Company:

(a) The Towing Company will man and operate said tug during the term of said agreement and any renewal thereof, and hereby assumes all and every obligation of the Canal Company created by or existing under the terms of said agreement, and the parties hereto expressly agree that the Canal Company shall have no control over or connection with the manning, provisioning or operation of said tug after the date of this contract.

(b) At the request of the Towing Company the Canal Company will exercise the option contained in said contract of renewing the same upon the same terms and conditions for a further period of three months. In such event, such renewal shall be for the benefit and account of the Towing Company and all the terms of this paragraph shall apply to the said renewal period.

3. The Canal Company assigns, transfers and sets over unto the Towing Company all of the right, title and interest of the Canal Company in and to the tug Pallas and the use thereof, under the terms of the existing monthly agreement between the Canal Company and the Boston Tow Boat Company as evidenced by correspondence between said Companies, copies of which have been submitted to the Towing Company.

(a) The Towing Company will operate said tug during the term of said agreement and hereby assumes all and every obligation of the Canal Company created by or existing under the terms of said agreement and any renewal thereof.

(b) The parties hereto expressly agree that the Canal Company shall have no control over or connection with the operation of said tug after the date of this agreement.

4. The Towing Company will use and possess said tug Hazelton and Pallas, at its own risk. The Canal Company shall be free of all liability in connection therewith, and shall not be liable for damages arising out of accidents to persons or property caused by or resulting from the negligence of the master, engineer, or any member of the crew of said tugs or either of them, or otherwise.

5. The Towing Company will furnish adequate towage facilities in the canal of the Canal Company to meet all reasonable requirements of shipping through said canal, and will operate its tugs subject to all reasonable rules and regulations made by the Canal Company for the use or operation of the tugs, and will establish and charge rates for towage services which shall first be submitted to and approved by the Canal Company. The Towing Company will tow vessels through the canal free of charge in cases where it is advisable to do so for the safety of the canal and no charge can properly be made against the owner of such vessels.

6. The Canal Company shall have no management of or control over the operation of any of the Towing Company's tugs, but the Towing Company will employ a manager of its towing service in the canal who shall be satisfactory to the Canal Company. In the event of an officer or employee of the Canal Company being employed by the Towing Company as manager of its said towing service it is understood and agreed that the services of such manager shall be paid for by the Towing Company, and shall be separate and distinct from all services rendered by him to the Canal Company. The Canal Company assumes no responsibility for such manager while engaged in the business of the Towing Company, and shall not be responsible for any of his acts or omissions while engaged in said business.

7. All tugs used by the Towing Company in furnishing towage service in the canal shall, during the period in which they shall be so engaged, be used exclusively for such service. The number of tugs so used shall be subject to the approval of the Canal Company, and the number shall be reduced or increased according to the towage requirements in the canal as determined from time to time by the Canal Company. The Canal Company guarantees that the gross receipts of the Towing Company from said towage business in the canal will amount to at least Three Thousand Dollars (\$3,000) in each and every month for each tug of the Towing Company engaged in such service during said period. If any tug shall be engaged in said service for less than a month, the gross receipts shall be apportioned accordingly in determining the obligations of the Canal Company under the terms of this guaranty. The amount of said gross receipts shall be determined at the end of each and every month, and if less than the amount herein guaranteed, the Canal Company will immediately pay to the Towing Company the amount of such difference.

8. This contract shall be in effect for one year from the date thereof and until thirty (30) days' notice in writing of its termination shall be given by either party to the other.

In witness whereof, the parties hereto have caused this agreement to be executed and delivered by their proper officers thereunto duly authorized the day and year first above written.

CAPE TOWING CORPORATION,
By FRANK J. OTT,
President.

Attest:

CHAS. MAASS,
Secretary.

BOSTON, CAPE COD & NEW YORK
CANAL COMPANY,
By AUGUST BELMONT,
President.

Attest:

CHAS. MAASS,
Secretary.

This cause was thence continued to the March Term, A. D. 1918, when this cause came on to be heard and was fully heard by the court on the nineteenth, twentieth, twenty-first, twenty-second, twenty-sixth, twenty-seventh and twenty-eighth days of March, and on the tenth day of April, A. D. 1918, a decision was announced by the court.

This cause was thence continued to the present June Term, A. D. 1918, when to wit, September 4, 1918, the following Final Decree is entered:

Final Decree.

September 4, 1918.

MORTON, J.:

This cause came on to be heard, and after a full hearing, and arguments of counsel, and in accordance with the terms of the opinion in this case filed, it is now, to wit, September 4, 1918, ordered, adjudged and decreed that the libel and intervening petition be dismissed as against both respondents and that the respondent Boston, Cape Cod & New York Canal Company recover of the libellant costs as taxed by the clerk and apportioned by the court in the sum of 148 (\$560.26) five hundred sixty and 26/100 dollars together with interest from the date hereof until paid; and of the intervening petitioner, Northern Coal Company, costs as taxed by the clerk and apportioned by the court in the sum of (\$100) one hundred dollars together with interest from the date hereof until paid; and the said T. A. Scott Company, Inc., recover from the respondent Boston, Cape Cod & New York Canal Company costs as taxed by the clerk in the sum of twenty dollars together with interest from the date hereof until paid; that unless this decree be satisfied or proceedings thereon be stayed by appeal within the time and in the manner

prescribed by law and the rules and practice of this court, executions shall issue accordingly.

By the Court,

FRANK H. MASON,
Deputy Clerk.

Approved as to form.

CURRIER, YOUNG & PILLSBURY,
*Proctors for Boston, Cape Code &
New York Canal Company.*

PARK & MATTISON,
Proctors for T. A. Scott Company, Inc.
BLODGETT, JONES, BURNHAM & BINGHAM,
Proctors for White Oak Transportation Co.

From the foregoing decree, the libellant, White Oak Transportation Company, and the Northern Coal Company, intervening petitioner, give good and sufficient security that they will prosecute their appeal to effect and answer all damages and costs if they fail to make their appeal good, and said appeal is allowed accordingly.

149

Memorandum of Decision.

April 10, 1918.

No. 1517, Civil.

BOSTON, CAPE COD & NEW YORK CANAL COMPANY

v.

T. A. SCOTT COMPANY, INC.

No. 1518, Civil.

BOSTON, CAPE COD & NEW YORK CANAL COMPANY

v.

WHITE OAK TRANSPORTATION COMPANY.

No. 1555, Civil.

WHITE OAK TRANSPORTATION COMPANY

v.

BOSTON, CAPE COD & NEW YORK CANAL COMPANY.

[NOTE.—The Memorandum of Decision will be found printed on pages 23 to 33, inclusive, of this Transcript of Record.]

Order Nunc pro Tunc Relative to Time for Filing Appeal.

October 5, 1918.

MORTON, J.:

In accordance with the agreement heretofore filed, it is now ordered nunc pro tunc that the time for filing libellant's and intervening petitioner's appeal and assignments of errors may be extended to and including Monday, October 7, 1918.

By the Court,

FRANK H. MASON,
Deputy Clerk.

Libellant's and Intervening Petitioner's Petition for Appeal.

[Filed October 7, 1918.]

The libellant, White Oak Transportation Company, and the Northern Coal Company, intervening petitioner, being aggrieved by the decree, rulings and findings of the United States District Court therein, claim an appeal from said decree, rulings and findings, and prays that *its* said appeal may be allowed.

WHITE OAK TRANSPORTATION
COMPANY,

By BLODGETT, JONES, BURNHAM &
BINGHAM,

Proctors.

NORTHERN COAL COMPANY,

Intervening Petitioner.

By WARNER, STACKPOLE &
BRADLEE.

R. S. S.

150 October 7, 1918.

Appeal allowed.

J. M. MORTON, Jr.,

*U. S. D. J.**Assignment of Errors.*

[Filed October 7, 1918.]

Now come the libellant and intervening petitioner in the above-entitled cause, and having claimed an appeal to the Circuit Court of Appeals for the First Circuit from the final decree entered in the District Court on September 4, 1918, file this their assignment of errors.

First. That the court erred in holding that the respondent, Boston, Cape Cod & New York Canal Company, was free from fault in the matter of the first stranding in its canal of said steamer Bay Port.

Second. That the court erred in holding that the respondent, Boston, Cape Cod & New York Canal Company, was free from fault in the matter of the second stranding and loss in its canal of said steamer Bay Port.

Third. That the court erred in stating, in its opinion, that at the time of both strandings neither the pilots nor the tugs were so far agents or servants of the Canal Company as to make it responsible for their negligence.

Fourth. That the court erred in not finding that, if there was any negligence on the part of either the pilots or tugs with respect to either stranding, the Canal Company was liable therefor.

Fifth. That the court erred in holding that pilot Rochester was an independent pilot employed by the Bay Port on her own account.

Sixth. That the court erred in not holding that the projection or "knuckle" in said canal was an improper condition to be allowed to exist, and that the Canal Company was liable for its effect upon the navigation of the Bay Port.

Seventh. That the court erred in that, after finding that it seemed probable that the cross current produced by the projection or "knuckle" was one of the forces which prevented the Bay Port
151 from being controlled in time to avoid stranding, it did not hold the Canal Company at fault for said stranding.

Eighth. That the court erred in holding that the shoal spot in the canal over which she passed just prior to her first stranding was not the proximate cause of said stranding.

Ninth. That the court erred in finding that the effect of said shoal on her steering did not extend beyond the time when the sheer to the north bank was checked.

Tenth. That the court erred in not holding that the improper condition of the bottom and sides of the canal in the vicinity of the first stranding constituted negligence on the part of the Canal Company.

Eleventh. That the court erred in holding that the first stranding was due either to mere accident or to faulty navigation by the pilot.

Twelfth. That the court erred in holding that even if the shoal was a negligent obstruction in the canal, it was not the cause of the second stranding.

Thirteenth. That the court erred in not finding that the Bay Port was at all times properly operated, and, except when her movements were influenced by the shoals and "knuckle," was under control.

Fourteenth. That the court erred in not entering a decree in favor of the White Oak Transportation Company and the intervening petitioner, Northern Coal Company.

Fifteenth. That the court erred in not finding that, upon the first stranding, all proper steps were taken to check the sheer and to enable her to recover her course before the stranding, and that the Canal Company is liable for said stranding.

Sixteenth. That the court erred in holding that the charges of negligence against the Canal Company by the libellant and intervening petitioner have not been sustained.

Seventeenth. That the court erred in not holding that the second stranding was caused by a shoal which existed in the canal, and in not holding the Canal Company at fault therefor.

Eighteenth. That the court erred in not finding that the
152 Bay Port was under control at the time she reached the shoal just prior to the second stranding, and that she became unmanageable by reason of said shoal.

Nineteenth. That the court erred in not holding that the Canal Company was at fault for representing that the canal had 25 feet of water at mean low tide when there was not this depth in all parts of the canal to its knowledge.

Twentieth. That the court erred in not holding that the steering and control of the Bay Port was, in each stranding, affected by the fact that the canal had not twenty-five feet of water at low tide as had been represented by the Canal Company, which were the causes or contributory causes of the strandings, and that the Canal Company was responsible for the consequent damages.

Twenty-first. That the court erred in not holding the Canal Company at fault for allowing its canal to remain in an unsafe condition for navigation of the Bay Port.

Twenty-second. That the court erred in not holding the canal at fault for permitting the Bay Port to enter the canal and navigate therein while the canal was in an unsafe condition for navigation by her.

Twenty-third. That the court erred in not holding the Canal Company at fault either in whole or in part for either or both of said strandings.

Twenty-fourth. That the court erred in dismissing the Transportation Company's libel and the Northern Coal Company's intervening petition with costs.

By Their Proctors, BLODGETT, JONES, BURNHAM &
BINGHAM,
WARNER STACKPOLE & BRADLEE,
R. S. S.

Bond on Appeal.

[Filed and Approved October 7, 1918.]

Know all men by these presents, that we, White Oak Transportation Company and Northern Coal Company, corporations duly existing by law and both having usual places of business in Boston, Massachusetts, as joint principals, and United States Fidelity
153 & Guaranty Company, a corporation duly organized by law and having a usual place of business in said Boston, as surety, are held and firmly bound unto Boston, Cape Cod & New York Canal Company, a corporation duly organized by law and having a usual place of business in New York City, New York, and T. A. Scott Company, Incorporated, a corporation duly existing by law and having a usual place of business in New London, Connecticut, in the full and just sum of two hundred and fifty dollars (\$250.) to be paid to the said Boston, Cape Cod & New York Canal Company or the T. A. Scott Company, Incorporated, or their certain attorneys, successors or assigns: to which payment, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, by these presents. Sealed with our seals and dated this seventh day of October in the year of our Lord one thousand nine hundred and eighteen.

Whereas, lately at a District Court of the United States for the District of Massachusetts in a suit in Admiralty depending in said court between White Oak Transportation Company (Northern Coal Company, intervening petitioner) and Boston, Cape Cod & New York Canal Company and T. A. Scott Company, Incorporated (impleaded), a decree was entered against the said White Oak Transportation Company, libellant, and Northern Coal Company, intervening petitioner, and the said White Oak Transportation Company and Northern Coal Company having obtained an appeal to remove said cause to the United States Circuit Court of Appeals for the First Circuit, to reverse the decree in the aforesaid suit, and a citation directed to the said Boston, Cape Cod & New York Canal Company and T. A. Scott Company, Incorporated, citing and admonishing them to be and appear in the said United States Circuit Court of Appeals for the First Circuit, in the city of Boston, Massachusetts, on the twenty-fifth day of October current.

Now, the condition of the above obligation is such, That if the said White Oak Transportation Company and the said Northern Coal Company jointly shall prosecute said appeal to effect, and answer all damages and costs if they fail to make said appeal good, then the above obligation to be void; else to remain in full force and virtue.

NORTHERN COAL COMPANY, [SEAL.]
By BORDEN COVEL,

President.

WHITE OAK TRANSPORTATION CO., [SEAL]
By GEORGE HAWLEY,

President.

UNITED STATES FIDELITY & GUAR-
ANTY COMPANY. [SEAL.]

D. R. PENNELL &

WM. L. BUSH,

True and Lawful Attorneys.

Sealed and delivered in presence of
FOYE M. MURPHY.

Approved:

J. M. MORTON, JR.,
U. S. D. J.

No. 1517, Civil.

BOSTON, CAPE COD & NEW YORK CANAL COMPANY

v.

T. A. SCOTT COMPANY, INC.

No. 1518, Civil.

BOSTON, CAPE COD & NEW YORK CANAL COMPANY

v.

WHITE OAK TRANSPORTATION COMPANY.

No. 1555, Civil.

WHITE OAK TRANSPORTATION COMPANY

v.

BOSTON, CAPE COD & NEW YORK CANAL COMPANY.

*Petition as to Testimony to be Filed in the United States Circuit
Court of Appeals.*

[Filed November 25, 1918.]

All parties join in requesting that the testimony in the above entitled causes, which has been used in the District Court, may become

the transcript on appeal without reduction to an abbreviated or narrative form.

CURRIER, YOUNG & PILLSBURY,
Proctors for Boston, Cape Cod & New York Canal Company, Libellant and Appellant in Nos. 1517 and 1518 and Respondent and Appellee in No. 1555.

155

PARK & MATTISON,
Proctors for The T. A. Scott Company, Inc., Respondent and Appellee in Nos. 1517 and 1555.

BLODGETT, JONES, BURNHAM & BINGHAM,
Proctors for White Oak Transportation Company, Respondent and Appellee in No. 1518 and Libellant and Appellant in No. 1555.

WARNER, STACKPOLE & BRADLEY,
Proctors for Northern Coal Company, Intervening Petitioner and Appellant in No. 1555.

So ordered.

J. M. MORTON, JR.,
United States District Court J.

Agreement as to Exhibits.

[Filed December 7, 1918.]

It is hereby agreed in the above-entitled cases that except for exhibits of the White Oak Transportation Company Nos. 1 to 7, inclusive, and No. 16, and for exhibits of the Boston, Cape Cod & New York Canal Company Nos. 2 to 4, inclusive, a copy of each of which is annexed to each copy of the record, all the exhibits in the above cases may be submitted in the original form to the Circuit Court of Appeals unattached to the record of the cases.

CURRIER, YOUNG & PILLSBURY,
Proctors for Boston, Cape Cod & New York Canal Company.

BLODGETT, JONES, BURNHAM & BINGHAM,
Proctors for White Oak Transportation Company.

PARK & MATTISON,
Proctors for The T. A. Scott Company, Inc.

WARNER, STACKPOLE & BRADLEY,
Proctors for Northern Coal Company.

156

Citation on Appeal.

UNITED STATES OF AMERICA, ss:

The President of the United States to Boston, Cape Cod and New York Canal Company, a Corporation Duly Organized by Law and Having a Place of Business in New York City, New York, and T. A. Scott Company, Inc., a Corporation Duly Existing by Law and Having Its Usual Place of Business in New London, Connecticut, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the First Circuit, in the city of Boston, Massachusetts, on the twenty-fifth day of October current, pursuant to an appeal duly obtained from a decree of the District Court of the United States for the District of Massachusetts, wherein White Oak Transportation Company, libellant, and Northern Coal Company, Intervening Petitioner, are appellants and you are appellees, to show cause, if any there be, why the said decree entered against the said appellants should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable James M. Morton, Jr., Judge of the District Court of the United States for the District of Massachusetts, this seventh day of October, in the year of our Lord one thousand nine hundred and eighteen.

JAMES M. MORTON, JR.,
United States District Judge.

Acknowledgement of Service on Citation.

October 15, 1918.

Due and sufficient service of the within citation is hereby accepted by the Boston, Cape Cod and New York Company.

By Its Proctors, CURRIER, YOUNG & PILLSBURY.

Due and sufficient service of the within citation is hereby accepted by T. A. Scott Company, Inc.

By Its Proctors, PARK & MATTISON.

157

Clerk's Certificate.

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

I, James S. Allen, Clerk of the District Court of the United States for the District of Massachusetts, certify that the two volumes entitled as follows:

Volume I, Pleadings;
Volume II, Testimony;

are true copies of the record and all proceedings in the cause in admiralty entitled, No. 1555. White Oak Transportation Co., Libellant, and Northern Coal Co., Intervening Petitioner, v. Boston, Cape Cod & New York Canal Co., Respondent, and T. A. Scott Co., Inc., Impleaded, in said District Court determined, the Memorandum of Decision, dated April 10, 1918, Order nunc pro tunc Relative to time for Filing Appeal, Libellant's and Intervening Petitioner's Petition for Appeal, Assignment of Errors, Bond on Appeal, Petition as to Testimony to be Filed in the United States Circuit Court of Appeals, Agreement as to Exhibits, and the original Citation issued upon the appeal of the libellant and the intervening petitioner, with the Acknowledgment of Service thereon.

In testimony whereof, I hereunto set my hand and affix the seal of said District Court, at Boston, in said District, this twentieth day of January, A. D. 1919.

[SEAL.]

JAMES S. ALLEN,
Clerk.

Order of Enlargement of Time for Docketing Cases and Filing Record.

For good cause shown, it is ordered that the time for docketing the cases and filing the record thereof with the Clerk of the United States Circuit Court of Appeals be enlarged to and including November 25, 1918.

J. M. MORTON, JR.

158 Assented to:

BLODGETT, JONES, BARNHAM &
BINGHAM,
WARNER, STACKPOLE & BRADLEE,
PARK & MATTISON,
CURRIER, YOUNG & PILLSBURY,
Being all Proctors of Record.

Order of Enlargement of Time for Docketing Cases and Filing Record.

MORTON, J.:

For good cause shown, it is ordered that the time for docketing the cases and filing the record thereof with the clerk of this court be enlarged to and including December 26, 1918.

J. M. MORTON, JR.

Assented to:

BLODGETT, JONES, BURNHAM &
BINGHAM,

Proctors for White Oak Transportation Company.

CURRIER, YOUNG & PILLSBURY,

*Proctors for Boston, Cape Cod & New York Canal
Company.*

PARK & MATTISON,

Proctors for The T. A. Scott Company, Inc.

WARNER, STACKPOLE & BRADLEE,

Proctors for Northern Coal Company.

*Order of Enlargement of Time for Docketing Cases and Filing
Record.*

December 24, 1918.

For good cause shown, it is ordered that the time for docketing the
above cases and filing the record thereof in the United States Circuit
Court of Appeals for the First Circuit be enlarged to and including
Saturday, January 25, 1919.

JAMES M. MORTON, JR.,

U. S. District Judge.

158½ United States Circuit Court of Appeals for the First Circuit.

No. 1397.

BOSTON, CAPE COD & NEW YORK CANAL COMPANY, Libellant,
Appellant,

v.

THE T. A. SCOTT COMPANY, INC., Respondent, Appellee.

No. 1398.

BOSTON, CAPE COD & NEW YORK CANAL COMPANY, Libellant,
Appellant,

v.

WHITE OAK TRANSPORTATION COMPANY, Respondent, Appellee.

No. 1399.

WHITE OAK TRANSPORTATION COMPANY et al., Appellants,

v.

BOSTON, CAPE COD & NEW YORK CANAL COMPANY et al., Appellees.

Clerk's Certificate.

I, Arthur I. Charron, Clerk of the United States Circuit Court of
Appeals for the First Circuit, certify that the two volumes, entitled
in the above causes, namely:

Volume I, Pleadings;
Volume II, Testimony;

this certificate being attached to each of said two volumes, contain and are a true copy of the record in said causes in said court.

In testimony whereof, I hereunto set my hand and affix the seal of said United States Circuit Court of Appeals for the First Circuit, at Boston, in said First Circuit, this twenty-ninth day of July, A. D. 1920.

[Seal of United States Circuit Court of Appeals First Circuit.]

ARTHUR I. CHARRON,

Clerk.

159 District Court of the United States, District of Massachusetts.

In Admiralty.

No. 1518.

BOSTON, CAPE COD & NEW YORK CANAL COMPANY

v.

WHITE OAK TRANSPORTATION COMPANY.

No. 1555.

WHITE OAK TRANSPORTATION COMPANY

v.

BOSTON, CAPE COD & NEW YORK CANAL COMPANY.

Evidence for White Oak Transportation Company.

Deposition of Howard F. Fanning, a witness on behalf of the White Oak Transportation Company, in the above-entitled causes, taken at the office of Messrs. Blodgett, Jones, Burnham & Bingham, 60 Federal Street, Boston, Massachusetts, on Monday, December 24, 1917, at 2 o'clock in the afternoon, before John C. Miller, notary public.

Appearances:

Messrs. Currier, Young & Pillsbury (Samuel H. Pillsbury, Esq., and Thomas H. Mahony, Esq.) for Boston, Cape Cod & New York Canal Company.

Messrs. Blodgett, Jones, Burnham & Bingham (Foye M. Murphy, Esq.) for White Oak Transportation Company.

Stipulation.

It is hereby stipulated by and between the proctors for the respective parties that the deposition may be taken in shorthand; signing, sealing, certification and filing being waived; copy to be served; stenographer's fees to be a taxable disbursement.

HOWARD F. FANNING, being duly sworn, deposes as follows:

160 (By Mr. Murphy:)

Q. 1. Your name is what, Mr. Fanning?

A. Howard F. Fanning.

Q. 2. And you are how old?

A. Twenty-one.

Q. 3. You live where?

A. 67 Smith Avenue, West Newton, Massachusetts.

Q. 4. And you are in what occupation?

A. I am a stenographer by occupation.

Q. 5. And for whom are you working now?

A. I am working now in the Quartermaster's Department of the National Army.

Q. 6. And you are about to be sent to parts unknown to you?

A. Yes, sir.

Q. 7. In December, 1916, what were you doing?

A. I was employed by Blodgett, Jones, Burnham & Bingham as a stenographer and investigator.

Q. 8. And what did you do in connection with this Bay Port case?

A. Why, I went from here to the Cape Cod Canal and took certain statements.

Q. 9. On what date did you leave here?

A. December 14th, I believe,—December 13th or 14th, I am not sure.

Q. 10. Call it the 13th. You went down with me, did you not?

A. Yes, sir.

Q. 11. Did you go immediately to the Bay Port when you arrived there?

A. Yes, sir.

Q. 12. With Captain Lewis and myself?

A. Yes, sir.

Q. 13. What did you see there? State generally. What did Captain Lewis do, and what did you see?

A. Why, there were several tugs lashed alongside there; and the Bay Port seemed at that time almost on the bank; and I went aboard of one tug and from that to still another and finally wound up in the lower compartment of one of the tugs, where the crew were eating supper. And part of the crew from the Bay Port were there; and the captain of the Bay Port came in shortly thereafter, and he was asked several questions by Captain Lewis.

Mr. Mahony: Pardon me just a moment. Don't you want to distinguish between this Captain Lewis and the other Captain Lewis?

As I understand it, this was Captain Joseph Lewis?

161 Mr. Murphy: This was Captain Joseph Lewis.

Q. 14. You mean Captain Joseph Lewis?

A. Captain Joseph Lewis. The other Captain Lewis came in probably 15 or 20 minutes after we started to talk with the captain of the Bay Port.

Q. 15. Did you hear Captain Joseph Lewis make inquiries there at that time?

A. Yes, sir.

Q. 16. With reference to what?

A. With reference to the time she had struck, the condition of the tide and her condition at that time.

Q. 17. Did you see Captain Joseph Lewis take any measurements?

A. Yes, sir.

Q. 18. And did you hear him make inquiries relative to the number of water bottoms and soundings and the like?

A. Yes, sir.

Q. 19. At that time did you hear Captain Joseph Lewis make any statements, himself?

A. No, sir.

Q. 20. Now, the next morning you went to the scene of the accident?

A. Yes, sir.

Q. 21. And saw the diver go down?

A. Yes, sir.

Q. 22. And hung around there until about 10 o'clock?

A. Yes, sir.

Q. 23. Just what did you do, beginning about 10 o'clock?

A. Why, about 10 o'clock it was lighting up, and the sun came out pretty well; and I took a camera I had with me, and one of the crew took me ashore in a small boat, and I took——

Q. 24. You took photographs of the Bay Port?

A. I took photographs of the Bay Port.

Q. 25. And what were those photographs,—which of these photographs here did you take at that time?

A. What was that question again?

Q. 26. Pick out the ones here that you took of the Bay Port in her first position. I have marked them on the back so you can refer to them by letters, if you want to.

A. I took A——

Q. 27. And A¹?

A. —and A¹, which is an enlargement of A; B and B¹, which is an enlargement of B; C and C¹; D and E.

Q. 28. And there are no enlargements of D and E?

A. There are no enlargements of those.

162 Q. 29. And are those fair representations of the situation there at that time?

A. They are.

Q. 30. And are those all the photographs which you took of her in her first position?

A. I believe there was one that did not come out.

Q. 31. I mean, that developed sufficiently to warrant printing?

A. Yes, sir.

Q. 32. Where were you standing when you snapped those photographs?

A. Why, I was standing opposite amidships, on one of them or two of them; and then I went aft.

Q. 33. On the south or north bank?

A. South bank.

Q. 34. Were you there when the vessel came off?

A. Yes, sir; I was standing on the south bank.

Q. 35. And one of those pictures was taken practically at the time she came off,—only a few seconds before?

A. A few seconds before.

Q. 36. Do you know which one it is?

A. I am not positive which picture it is.

Q. 37. At the time she came off, how were the other vessels arranged around the Bay Port?

A. The Salvor was about opposite No. 2 hatch, making some preparations to take out coal. The Stuart was just forward of the Salvor,—the tug John C. Stuart. The Hazelton was on the port bow of the Bay Port, forward; and I believe the Dalzelline was in the situation, but I am not sure just where she was,—I can't recall just the position of the Dalzelline.

Q. 38. What did you do when the Bay Port started to move?

A. I simply stood and watched her.

Q. 39. And did you see her when she went out of sight around the turn?

A. Yes, sir.

Q. 40. Did you note what time it was when she went out of sight around the turn?

A. Just prior to that I took out my watch.

Q. 41. And how many minutes was it after she slipped off that you looked at your watch?

A. I should say five or six minutes after she first started.

Q. 42. And what time was it when you looked at your watch?

A. 10.20.

Q. 43. That was on the morning of the 14th?

A. Yes, sir.

163 Q. 44. And was your watch keeping good time at that time?

A. Very good time.

Q. 45. And was that time correct so far as you know?

A. So far as I know.

Q. 46. When you saw the Bay Port start to move, did you see anything with reference to pilot William Lewis and Captain Hammett or Captain Joe Lewis?

A. I don't remember anything with reference to Captain Joseph Lewis. I don't remember just where he was, or remember seeing him. I remember seeing Captain William Lewis and Captain Hammett talking on the starboard runway there. They seemed to be—my recollection is, that they were somewhere near No. 2 hatch.

Q. 47. That is, before she slid off?

A. Just before she slid off.

Q. 48. Just at the time she started to move or immediately thereafter, what did you see of them?

A. Captain Lewis ran up on top of the pilot-house immediately,—Captain William Lewis; and Captain Hammett followed him shortly thereafter.

Q. 49. And did you see what the tug John C. Stuart was doing after the Bay Port left?

A. Why, she was manœvering the Salvor.

Q. 50. Did you follow down to where the Bay Port finally sank?

A. I did.

Q. 51. And did you take more photographs?

A. Yes, sir.

Q. 52. And those are the photographs marked what?

A. F and F¹, which is an enlargement of F; and G, of which there is no enlargement.

Q. 53. And are those fair representations of what you saw at that time?

A. They are.

Q. 54. Did you later take any statement of Captain Joe Lewis?

A. I took the statement of Captain Joseph Lewis?

Q. 55. And where was that taken?

A. It was taken in the Buzzard's Bay depot.

Q. 56. And on what day?

A. At noon of the 14th,—around noon of the 14th.

Q. 57. And you took that statement stenographically?

A. Yes, sir.

Q. 58. And transcribed it?

A. Yes, sir.

164 Q. 59. And have you the transcribed notes?

[The witness produces the transcript.]

Mr. Murphy: I offer this with the deposition; and it is subject to objections by Mr. Pillsbury at the time of the trial.

Q. 60. Who interrogated Captain Lewis?

A. You did,—Mr. Murphy.

Q. 61. And did you take down everything that I asked him and everything which he said in reply?

A. Yes, sir.

Q. 62. And have you transcribed there everything that you took down in your notes?

A. Yes, sir.

Q. 63. Previous to that had you come up the canal in one of the tugboats?

A. Yes, sir.

Q. 64. With Captain Lewis and me?

A. Yes, sir.

Q. 65. And did you hear him make any further statement which you did not at that time take down stenographically?

A. Yes, sir.

Q. 66. And what was that?

A. I heard him make a statement with reference to the condition of the canal.

Q. 67. What did he say?

A. He said that the constant swashing of the propellers of several New York boats that went through there at quite a speed was causing the sand to wash into the center of the canal and leaving great boulders and other obstructions to come up, leaving the rip-rap almost bare.

Q. 68. Almost what?

A. Almost bare.

Q. 69. Bare?

A. Yes,—the sand had washed out,—the sand had washed from the sides into the center.

Q. 70. Leaving the rip-rap in what position? I did not get that.

A. Leaving it bare; that is, leaving the boulders sticking up.

Q. 71. Did he say anything as to how far the rip-rap in places had been lowered, if any?

A. He said that at certain places it had been lowered so it was almost horizontal.

Q. 72. Did you yourself see places where the rip-rap was in that position?

A. I did.

Q. 73. And did he say anything as to what the result was in the canal of having that sand washed out?

A. Repeat that.

Q. 74. Did he say anything as to what was the effect, if any, in the canal of having that sand washed out from under the rip-rap?

A. I don't know as I remember him saying anything in particular about that. There was quite a conversation went on with reference to the—

Q. 75. I mean as to whether or not the sand caused any shoal places in the canal?

A. Why, yes, he said that it was causing shoals at certain points.

Mr. Pillsbury: This is still Joseph Lewis?

Mr. Murphy: Yes.

Q. 76. Did he tell you at that time where those points were?

A. If he told me, I don't remember where he said; I was not familiar with the canal.

Q. 77. Did you take any other statements of Captain Lewis at any time?

A. No, sir.

Q. 78. Or any other photographs of the Bay Port which you have not mentioned?

A. None, except those that appear and several that did not come out sufficiently to warrant developing.

Cross-examination.

(By Mr. Pillsbury:)

X Q. 79. Tell me again what Captain Joseph Lewis said about boulders in the canal.

A. The conversation took place, as I remember it, in the tug when we were going—I don't remember whether we were going up to the position of the Bay Port or coming back. It was a general conversation about the condition of the canal, etc.; and he said that several New York boats, going through there at quite a speed, had caused, by the swashing of their propellers, a sucking of the sand into the center of the canal, away from the rip-rap; and that it had lowered the rip-rap until it was almost horizontal in places.

X Q. 80. Well, notice my question, which was, to tell me again what he said about boulders being caused to stick up, as you put it, by this process. Did he say anything about boulders being caused to stick up in the canal by the passing of the New York boats?

A. I don't know whether he connected the two statements in that way or not; but he did make a statement that the sand being sucked away from the rip-rap was causing boulders to stick up at several points along the canal.

166 X Q. 81. Well, stick up in the middle of the canal?

A. No, sir.

X Q. 82. Where?

A. Along the sides, on the banks.

X Q. 83. On the banks of the canal. You do not mean they stuck up higher than they were? You mean you could see them, where you could not see them before,—is that it?

A. Yes, sir.

X Q. 84. You do not mean to suggest that he said that boulders in the canal, as distinguished from the bank, were either caused to be there or caused to stick up higher than they formerly were, by this passing of the New York boats, do you?

A. That was my understanding of his remarks.

X Q. 85. That boulders in the canal itself were caused to stick up higher than they were before, by the passing of the boats?

A. Yes, sir; by the sand being sucked away from them.

X Q. 86. That is, boulders where—on the bank of the canal, or in the channel?

A. In the canal, under water, and what I would call the banks,—toward the shore; I don't know how to express it.

X Q. 87. How many times have you been down to the canal?

A. Just this once.

X Q. 88. And you were an investigator employed by this office, and you are accustomed to investigate these cases, are you not?

A. Yes, sir.

X Q. 89. So you noticed the general construction of the canal; you knew that it had slopes, and it had a channel,—you knew that, did you not?

A. Yes, sir.

X Q. 90. Well, now, will you tell me again whether you understood Captain Lewis to say that any boulders were caused to stick up in the channel of the canal by the sucking of sand away from them?

A. I did not understand him to mean in the channel.

X Q. 91. Did you understand him to say that any boulders on the slopes were caused to stick up any higher than they formerly stuck up, by this process which you have described?

A. That was what I took from his statement.

X Q. 92. How could a boulder be made to stick up any higher than it formerly stuck up by this process; that is, how did you understand Captain Lewis to indicate that?

A. Why, I suppose he meant that by taking the sand away
167 it left the boulder bare, so to speak; it did not actually raise them with reference to the position of the—from the earth,—it simply left them bare.

X Q. 93. Well, that is what I suppose; yes. Now, this conversation took place before you got to the Bay Port?

A. Why, it took place, as I remember it, the second morning, the morning of the 14th, going up to the Bay Port.

X Q. 94. Before you got there?

A. Well, we had been there the night before.

X Q. 95. I mean, before you got there that morning?

A. Yes, sir.

X Q. 96. What did he say, if anything, in relation to what he was doing about the wreck?

A. I don't remember, in particular, anything.

X Q. 97. Either that he was doing or intended to do?

A. I don't remember what he did say. I remember there were remarks made from time to time about this plan and that plan; but I don't remember what they were.

X Q. 98. Just think a minute and see if you cannot recall some of them, because that is really quite important, I think, if he did speak of any plans that he had about it, that you should tell us. Of course, we do not expect you to tell us in detail, but merely roughly how he indicated that he was going to handle the situation.

A. The first night I remember he did say that he could not do anything until he had a diver go down there and examine the hole.

X Q. 99. He said that the night before.

A. That was the night before—the first time we were aboard the Bay Port.

X Q. 100. Did you happen to know when the diver went down?

A. Do I happen to know at what time he went down?

X Q. 101. Yes. That is, had the diver been down at the time you were going up to the Bay Port in this tug with the captain?

A. No, sir.

X Q. 102. He had not been down then?

A. No, sir; he went down after we arrived that morning.

X Q. 103. How long were you with him that morning?

A. I was with him from the time—from somewhere around 3.30

until we arrived at the Bay Port, probably an hour later. I
168 don't know whether it took an hour for us to go up there
or not; that is, from the time we left where we were staying
until we arrived at the Bay Port.

X Q. 104. Did he say anything at all as to what steps, if any, he
was going to take to insure the safety of the wreck as it then was?

A. Do you mean with reference to the first time we went there?

X Q. 105. Yes.

A. I think he did give directions to the——

X Q. 106. No—this is what he said to you.

A. Oh, did he say anything to me?

X Q. 107. Did he say anything to you about it?

A. No, he said nothing to me.

X Q. 108. Did you hear him give orders in relation to that matter?

A. The first night—that is, the first time we were there—just
prior to our leaving he gave directions to keep the Bay Port up the
bank; that is, gave directions to the captains of the tugs that were
to stand by her during the night.

X Q. 109. Can't you be a little more specific about that? Were
all the captains assembled at some point, and did he say: "Now I
want to give you instructions for the night;" or how did it take
place?

A. No; I believe he gave his instructions through Captain Wil-
liam Lewis.

X Q. 110. That is, Captain Joseph Lewis did not directly address
the captains of the tugs in your presence?

A. Not in person, in my presence.

X Q. 111. Did you hear him say it to Captain William Lewis?

A. Yes, sir; that is my recollection.

X Q. 112. Tell me what he said to Captain William Lewis.

A. Why, I can't say—I can't repeat his words, nor I don't re-
member exactly what he said to him.

X Q. 113. I know that, but in substance what did he say?

A. Why, in substance, he directed Captain Lewis to tell the
captains of the tugs to keep their noses right on the Bay Port and
keep her up on to the bank; keep her in the position she was; not
let her get off there.

X Q. 114. Did he mention any particular reason for apprehension
about her going off?

A. Not that I recall.

169 X Q. 115. Did he suggest to Captain William Lewis any
other method of keeping her on the bank except for the tugs
to keep their noses against her?

A. I don't remember that he did.

X Q. 116. What did Captain William Lewis say when he gave
him that order?

A. I don't remember what he said or whether he did say any-
thing.

X Q. 117. You do not remember that he said anything at all?

A. I do not remember that he did.

X Q. 118. Well, did you see him do anything in consequence of that direction?

A. You mean did I see——

X Q. 119. William Lewis?

A. No, sir.

X Q. 120. Did you go away immediately after that was said?

A. I believe I left the room there where we were, shortly after that.

X Q. 121. And Joseph Lewis left at the same time, did he not?

A. He left behind me. I left first.

X Q. 122. Then you left him there?

A. I did.

X Q. 123. Well, that was the night before this conversation that you were just testifying to a little while ago. Now, when you got to the Bay Port the next day with him, what did you see him do or hear him say to William Lewis or any of the tugboat captains, or anybody else?

A. I didn't see him do anything; that is, I was very cold, and when I first arrived I went in the wheel-house of one of the tugs to get warm, and I don't know what he did when we first arrived.

X Q. 124. Did you talk with him at all about any plans that he had about the wreck?

A. No, sir.

X Q. 125. Other than you have already said that he did mention some two or three plans, but you can't remember what they were?

A. Yes, I recall that there were several plans put forward, but they did not mean a whole lot to me, not understanding how a thing of that kind should be done, and I didn't take particular note of it.

X Q. 126. Do you recall in that conversation, or any of the conversations on that day, anything being said about the necessity of keeping her against the bank?

A. No, I do not recall anything, after that first night, about that plan.

170 X Q. 127. You were there when she went off actually, were you not?

A. Yes, sir.

X Q. 128. Where was Joseph Lewis when she slid off?

A. I don't know.

X Q. 129. Where was William Lewis?

A. He was on the starboard side of the Bay Port, a little forward of amidships.

X Q. 130. Did you hear him give any orders when she slid off, or just before?

A. Why, I heard him—I couldn't say that I did hear him give orders, because I didn't understand what he said.

X Q. 131. Where were the other officers of the Bay Port?

A. Captain Hammett was talking with him when she slid off.

X Q. 132. Did you hear Captain Hammett give any orders?

A. No, sir.

X Q. 133. Now tell me what all the tugs did when she slid off.

A. The Dalzelline, as I remember it, appeared from practically

out of the sky, I didn't remember of her being there prior to that time, and she swung around right at the nose off the Bay Port on the starboard bow. There were some movements to get a line aboard the Bay Port; and the Hazelton also attempted to swing around on the port bow, swinging in the other direction. I remember the Dalzelline came very near the south bank; I thought at the time that she was going ashore. And the Dalzelline finally did get a line on the Bay Port.

X Q. 134. When this farewell was given which you refer to in your stenographic notes, did the ship seem to be under control?

A. I don't know whether she was or not.

X Q. 135. Well, you saw it?

A. Yes, sir.

X Q. 136. Did it seem to you that she was under control?

A. She seemed to be at that time; they seemed to be getting her out into the channel and she seemed to be going along.

Q. 137. How far did she go before she rounded the turn so you lost sight of her?

A. Probably 250 or 300 yards, as I remember it now.

X Q. 138. And during that time that she traversed that distance, did she seem to you to be under control?

A. She seemed to be.

X Q. 139. When you last saw her, what were the relations
171 of the tugs to her, what were they doing?

A. I remember only the Dalzelline had a line on her; I don't remember whether the line was taut or just how it was.

X Q. 140. What about the other tugs?

A. The Stuart was engaged in taking care of the Salvor; and I don't just remember what happened to the Hazelton after she started.

X Q. 141. You did not see Joseph Lewis after the boat had gone off, did you, to talk with,—after the boat went off the bank?

A. Yes, I talked,—I did not talk directly to him; I overheard conversations which he had with Mr. Murphy, and he probably did make several remarks to me; that is, after we had come up from the Bay Port, after she had struck in the second position; that is, noon of the 14th.

X Q. 142. Did he say anything about her going off the bank?

A. He undoubtedly made remarks about her going off. I don't remember them.

X Q. 143. What did he say was the reason she went off?

A. I don't remember that he said anything about it,—gave any reason for her going off.

X Q. 144. Well, did he express any dissatisfaction with the fact that she had gone off?

A. I don't recall that.

X Q. 145. Did he express any surprise that she should go off?

A. I don't remember that he did.

X Q. 146. You heard him give directions to the tugs to keep their noses against her to keep her against the bank or on the bank?

A. I heard him give directions to Captain William Lewis.

X Q. 147. Yes, to Captain William Lewis. Did he say anything about the occasion of her going off,—that if something or other had been done she would not have gone off, or discuss that subject in any way as to why she went off?

A. I don't remember that he did.

X Q. 148. Did Mr. Murphy ask him that question?

A. My recollection is pretty hazy on the whole thing in general. I don't remember of Mr. Murphy asking him that.

X Q. 149. And you do not remember of his discussing the reason that she went off at all?

A. I do not.

172 Redirect examination.

(By Mr. Murphy:)

Q. 150. Did the Bay Port have steam up when she went off, did you notice?

A. She must have had steam up, because,—yes, I remember she did have steam up, and then there were whistles blown immediately she started to slide.

Q. 151. On the Bay Port?

A. Yes, sir.

Q. 152. Now, with reference to these orders, do you know just what he did say,—the exact words of Captain Joe Lewis at that time?

A. No, sir.

Q. 153. Do you recall his stating to Captain William Lewis that it would be better if the tugs kept their noses against the Bay Port, because, although it would do no good, the Canal Company would blame the tugs if they did not do it?

A. I don't remember that.

Q. 154. You don't remember that. Did you yourself hear Captain Lewis issue any orders to these tugboat captains or those in charge of the tugs?

A. I know he did not in my presence issue any orders to the captains of the tugs themselves.

Q. 155. Now, are you sure it was an order which he gave to Captain William Lewis, or simply advice? I mean, you have characterized it as an "order." Now state just what you mean by that.

A. I could not say that it was an order. He did not exactly stipulate in words just what they were to do. It was just my recollection of what went on that evening while I was there. I couldn't say it was an order.

Mr. Murphy: I think that is all.

Mr. Pillsbury: That is all.

173 District Court of the United States, District of Massachusetts,
In Admiralty.

No. 1517.

BOSTON, CAPE COD & NEW YORK CANAL COMPANY

v.

THE T. A. SCOTT COMPANY, INC.

No. 1518.

BOSTON, CAPE COD & NEW YORK CANAL COMPANY

v.

WHITE OAK TRANSPORTATION COMPANY.

No. 1555.

WHITE OAK TRANSPORTATION COMPANY

v.

BOSTON, CAPE COD & NEW YORK CANAL COMPANY and THE T. A.
SCOTT COMPANY, INC.

Evidence for The T. A. Scott Company, Inc.

Deposition of William Murray McDonald, a Witness on Behalf of
The T. A. Scott Company, Inc., in the Above-entitled Causes,
Taken at the Office of Messrs. Blodgett, Jones, Burnham & Bingham,
60 Federal Street, Boston, Massachusetts, on Monday, March
4, 1918, at Three O'clock in the Afternoon, Before John C. Miller,
Notary Public.

Appearances:

Messrs. Currier, Young & Pillsbury (Samuel H. Pillsbury, Esq.)
for Boston, Cape Cod & New York Canal Company.

Messrs. Blodgett, Jones, Burnham & Bingham (Foye M. Murphy,
Esq.) for White Oak Transportation Company.

Messrs. Park & Mattison (Samuel Park, Esq.) for T. A. Scott
Company, Inc.

Stipulation.

It is hereby stipulated, by and between the proctors for the respective parties, that the deposition may be taken in shorthand; signing, sealing, certification and filing being waived; copy to be served; stenographer's fees to be a taxable disbursement.

174 WILLIAM MURRAY McDONALD, being duly sworn, deposes as follows:

(By Mr. Park:)

Q. 1. What is your full name, Mr. McDonald?

A. William Murray.

Q. 2. William Murray McDonald?

A. Yes, sir.

Q. 3. And what has been your occupation?

A. Diver and engineer.

Q. 4. That is, you have led a seafaring life?

A. Yes, sir.

Q. 5. You are about to proceed now on a voyage or trip out of the country?

A. Yes, sir.

Q. 6. You expect to go immediately?

A. Yes, sir.

Q. 7. What was your employment in December, 1916?

A. I was employed as a diver at the office of T. A. Scott Company, East Boston.

Q. 8. Did you go down on the boat Salvor from Boston to the Cape Cod Canal at the time the Bay Port was stranded?

A. Yes, sir.

Q. 9. And what time did you arrive there?

A. I don't remember the date.

Q. 10. Where were you and what were you doing just previous to the Bay Port leaving her stranded position?

A. I was in the forward house, trying to locate a place to hook a tackle to lower a pump down to the forepeak.

Q. 11. On the Bay Port?

A. Yes, sir.

Q. 12. Was anybody else of The T. A. Scott Company on the boat besides you?

A. Not that I know of.

Q. 13. Do you know where Captain Joseph Lewis was?

A. He was on the Salvor's deck.

Q. 14. And where was the Salvor?

A. Tied up alongside of the Bay Port.

Q. 15. Did the Bay Port have a list at all?

A. Very slight.

Q. 16. Which way,—port or starboard?

A. Port list.

Q. 17. Port list. Do you know pilot Lewis, who was on the Bay Port?

A. Very little; very slightly.

Q. 18. Do you know him when you see him?

A. Yes, sir.

175 Q. 19. When the Bay Port slid off the bank, where was pilot Lewis?

A. He was on the bridge.

Q. 20. Who else, if you know, was on the bridge?

A. Nobody that I know of.

Q. 21. Did you hear any conversation between pilot Lewis and Captain Joseph Lewis just after she slid off the bank?

A. Yes.

Q. 22. State that conversation.

Mr. Pillsbury: There is the usual stipulation about objections, I suppose?

Mr. Park: Yes.

A. Captain Lewis of the Scott Company said: "She is up to you, Captain Lewis,—the pilot," he said. Captain Lewis, the pilot replied, "I have got her," and at the same time raised one of his hands, I don't know which one.

Q. 23. Do you remember any other conversation which occurred between the two Lewises?

A. No, sir.

Q. 24. Did you see any tugboats about there?

A. Three; yes, sir.

Q. 25. Do you know in what position they were in relation to the steamship?

A. No, sir.

Q. 26. Do you know whether they were made fast to the steamship or not?

A. Not to be positive; no, sir.

Q. 27. Did you remain on the ship until she had stranded the second time?

A. Yes, sir.

Q. 28. Were you on board of the Bay Port when she was stranded the second time?

A. Yes, sir.

Q. 29. Where were you standing?

A. About amidships.

Q. 30. Who had charge of the Bay Port?

A. Captain Lewis, as far as I know.

Mr. Murphy: Which Lewis?

The Witness: Captain Lewis, the pilot.

Q. 31. Was there a tugboat attached to the Bay Port at that time?

A. Yes, sir.

Q. 32. Do you remember her name?

A. Dalzelline.

Q. 33. And where was she as respects the Bay Port?

A. She was at the Bay Port's bow, with a short hawser from her stern to the Bay Port's bow.

176 Q. 34. Was there any other steamtug besides the Dalzelline made fast to her, do you know?

A. No, sir; no other.

Q. 35. Will you describe how the Bay Port became stranded the

second time; I mean, in reference to her striking or any sheer, if there was any?

A. She was making a curve in the canal, and she sheered to the north bank, or apparently sheered to the north bank. The possibility was that the Dalzelline was trying to swing her to the curve. However, he swung her south; and she came—she sheered pretty well to the south when he swung that way,—so that he swung her sharply back to the north, and she struck on the north bank. She slid up pretty well on the bank, the stern still swinging all the time to the eastward; and, the bow stopping going to the eastward, she slid up on the bank. And then when she was almost across the canal she slid backwards,—slid off the bank, and her heel took on the south bank. Then she straightened up, and her bow hit the south bank and swung off again; and she sank and rolled over to port.

Q. 36. Was her stern nearer the southern bank, or her bow nearer the southern bank, when she became fixed on the bottom?

A. I beg pardon?

Q. 37. Was her stern, or bow, nearest the southern bank as she became fixed on the bottom?

A. Her stern.

Q. 38. How far was that from the place of her first stranding?

A. I should say two miles.

Q. 39. How many years' experience, Mr. McDonald, have you had on the water?

A. About twelve years.

Q. 40. And of that time how many years have you been a diver?

A. About seven years.

Q. 41. You did not, yourself, go under the Bay Port?

A. No, sir.

Q. 42. What diver did go down and examine her?

A. William Brunn.

Q. 43. Was he a diver attached to the Salvor?

A. He was one of T. A. Scott Company's divers.

Q. 44. Was he attached to the boat Salvor that was taken down by you?

A. No, sir.

177 Q. 45. Or was he located in the canal?

A. He was located in the canal at the time.

Q. 46. Doing other work?

A. Yes, sir.

Cross-examination.

(By Mr. Pillsbury:)

X Q. 47. When the Bay Port slid off as you have described, what was her condition as to stability; that is, after she had slid off, when she was off the bank, did she still have a list?

A. Not that I noticed.

X Q. 48. Was there any water in her?

A. Yes, sir, there was some water in her.

X Q. 49. How much and where?

A. Well, the only place that I know of that there was water in her would be in forward,—that I know of.

X Q. 50. And how much was there, do you think?

A. I don't know, sir.

X Q. 51. Did she seem down at the head?

A. No, sir; she did not.

X Q. 52. Was she up at the head?

A. She seemed to me to be about on an even keel.

X Q. 53. Did she have steam up?

A. Yes, sir.

X Q. 54. When did you see her the first time; that is, when did you arrive on the scene?

A. The morning that she floated.

X Q. 55. As you proceeded up the canal, did the Bay Port seem under control?

A. Yes, sir.

X Q. 56. And, as far as you could see, there was nothing wrong with her?

A. No, sir.

X Q. 57. Where were you, or where was the Bay Port, when the first indication of lack of control or deviation from the course took place, in relation to this curve that you have spoken of?

A. Near the curve,—just about when she was making the curve.

X Q. 58. Can you identify that curve at all?

A. It was near the Bournedale Ferry.

X Q. 59. How much line did the Dalzelline have at the time?

A. How much line?

X Q. 60. Yes.

A. I should say she had a 50-foot line; between 25 and 50 feet of line on her.

178 X Q. 61. Will you describe again just what took place on the curve?

A. The ship, in making the curve, seemed to me to sheer to the north bank—

X Q. 62. What was the tug doing at the time she sheered to the north bank?

A. Well, he sheered her to the south.

X Q. 63. The tug sheered the ship to the south?

A. Yes, sir.

X Q. 64. Then what did the tug do?

A. Then he sheered her back north.

X Q. 65. Sheered her back north again?

A. Yes, sir.

X Q. 66. To try to straighten her out?

A. Yes.

X Q. 67. And apparently overdid it,—is that it?

A. It seemed so to me; yes, sir.

Mr. Pillsbury: I think that is all.

(By Mr. Murphy:)

X Q. 68. Where were you on the Bay Port after she slid off from the first stranding, up to the time that she struck on the north bank?

A. I was on the deck of the Bay Port.

X Q. 69. Do you know what the Bay Port drew forward or aft?

A. No, sir; I do not.

X Q. 70. You do not know whether she was on an even keel or not?

A. No, sir; I couldn't be positive of that.

X Q. 71. You do not know how much water there was in her hold—

A. No, sir.

X Q. 72. —in her water bottom?

A. No, sir.

X Q. 73. And with reference to this sheering, you do not know actually whether the act of the tugboat was an overdoing of it or not, do you?

A. I think it was.

X Q. 74. But you do not know?

A. No, sir.

X Q. 75. You were not in the pilot-house?

A. No, sir.

X Q. 76. You don't know how she was answering her helm?

A. No, sir.

X Q. 77. You don't know but that she may have been sheering herself, without any action of the tug?

A. She could have, yes, sir; she could have sheered herself.

Mr. Murphy: That is all.

Mr. Pillsbury: That is all.

Mr. Park: I do not know of anything further.

179 District Court of the United States, District of Massachusetts.

In Admiralty.

No. 1517.

BOSTON, CAPE COD & NEW YORK CANAL COMPANY

v.

THE T. A. SCOTT COMPANY, INC.

No. 1518.

BOSTON, CAPE COD & NEW YORK CANAL COMPANY

v.

WHITE OAK TRANSPORTATION COMPANY.

No. 1555.

WHITE OAK TRANSPORTATION COMPANY

v.

BOSTON, CAPE COD & NEW YORK CANAL COMPANY and THE T. A.
SCOTT COMPANY, INC.

Testimony Taken in Open Court.

Morton, J.

Evidence for Boston, Cape Cod & New York Canal Company.

Appearances:

Messrs. Currier, Young & Pillsbury (Samuel H. Pillsbury, Esq., and Thomas H. Mahony, Esq.) for Boston, Cape Cod & New York Canal Company.

Messrs. Blodgett, Jones, Burnham & Bingham (Edward E. Blodgett, Esq., Foye M. Murphy, Esq., and Albert T. Gould, Esq.) for White Oak Transportation Company.

Messrs. Park & Mattison (Samuel Park, Esq.) for The T. A. Scott Company, Inc.

Boston, Mass., March 19, 1918.

Opening Statement of Samuel H. Pillsbury, Esq., on Behalf of
Boston, Cape Cod & New York Canal Company.

MAY IT PLEASE THE COURT: There are really three cases before
your Honor, which are to be tried together. The first in
180 point of time is the suit of the Boston, Cape Cod and New
York Canal Company against the White Oak Transportation
Company.

Mr. Blodgett: It think the first number, Mr. Pillsbury, is the one against The T. A. Scott Company, is it not,—the lowest number?

Mr. Pillsbury: The first suit brought, I think, was the one against you.

Mr. Blodgett: The first one numbered on the docket is against The T. A. Scott Company, I think.

The Clerk: The Scott case is the first.

Mr. Park: It was filed first.

Mr. Blodgett: That must have been filed first.

Mr. Pillsbury: It was brought by an intervening petition, was it not?

Mr. Blodgett: No; there was a libel brought, first, against The T. A. Scott Company, and that case was No. 1517. Then there was a libel against the White Oak Transportation Company, No. 1518. And there is a later libel by us against you.

Mr. Pillsbury: Yes. So that the first case in point of time is that of the Boston, Cape Cod & New York Canal Company against The T. A. Scott Company, Inc., and the next is the case of the Boston, Cape Cod & New York Canal Company against the White Oak Transportation Company.

The Scott Company were a wrecking concern, and the White Oak Transportation Company were the owners of the steamship which sank in the canal.

Later, the White Oak Transportation Company brings a libel against the Boston, Cape Cod & New York Canal Company; and still later the Boston, Cape Cod & New York Canal Company, by petition under Rule 59, summons in The Scott Company as a co-defendant in that action.

So that the record, as it stands, is as follows: There are two suits of the Canal Company; one against the owners of the Bay Port which sank in the canal,—that is, the White Oak Transportation Company; the other against The Scott Company, which was a wrecking concern employed by the owners of the ship; and, 181 third, the suit of the owners of the ship against the Canal

Company on account of the sinking, in which suit the wrecking concern, The Scott Company, are made codefendants by petition under Rule 59.

All of these cases will be tried together.

The Court: By agreement, I understand?

Mr. Pillsbury: By agreement; yes, sir. But, inasmuch as my client brought the first libels, I will take the initiative in putting in the evidence.

The accident, or one of the accidents—because there are two accidents involved in this case—the first accident occurred on the 13th of December, 1916. The name of the ship was the Bay Port. It was a whaleback, and it was on a voyage from Newport News, Virginia, to Weymouth.

The Court: To where?

Mr. Pillsbury: To Weymouth, Massachusetts.

She signaled for a pilot in Buzzard's Bay at about 12 o'clock on the 13th of December; and, a pilot going aboard, she entered the

canal and went ashore about half way through the canal, where she stayed ashore over night. A wrecking company was summoned by the owners; they found a small hole, which they plugged; and the next day she suddenly went off, about, as I recall it, 10.15 in the morning.

At that time, as we say, she was under the control of the wrecking company or the captain of the ship,—not under the control of either the pilots of the canal or the tugboats or anyone other than the wrecking company and the owners represented by the captain.

She went up the canal about a mile, practically under no control, and again went aground, this time sinking.

The theory of the Canal Company in its libel against the owners of the boat and The Scott Wrecking Company is twofold: As against the owners of the boat, the Canal Company claims that the captain of the ship and the owners were negligent in taking a ship of this type, loaded as she was, into a narrow waterway, with currents such as the Cape Cod Canal has. We shall attempt to show that this whaleback was built for lake service; that she was put on
182 to the coastwise service and subjected to new conditions, especially as to her ballast tanks; that she, on the occasion in question, was loaded to such a point that she was unmanageable in a narrow waterway with a current; that that loading was either known or should have been known to the owners as being such a loading as would render her unseaworthy in such a canal as the Cape Cod Canal.

The theory of the Canal Company against The Scott Company is, that The Scott Company were negligent in not having proper arrangements made to take care of the ship when she floated, it being their duty, inasmuch as they were employed by the owners to float her, to float her safely; that they did not float her safely, as a result of which she grounded the second time and was lost.

And, under Rule 59, the theory of the Canal Company is, that inasmuch as the owners of the Bay Port have sued the Canal Company for the loss of this boat, The Scott Company should be summoned in as a codefendant, and your Honor has issued such a summons, and The Scott Company is before your Honor.

The theory of the owners of the boat in their libel against the Canal Company is, that the boat was seaworthy, in proper condition to navigate the canal; and, because of shoals in the canal or cross currents, swirls or otherwise, the ship was caused to sink through the fault of the Canal Company.

The theory of The Scott Company in its defence, if I understand it correctly, is that they were employed merely to float the ship, and they are in no way responsible for what happened after she floated. And they deny that they were in control of the situation either at the time the ship floated or later when she sank.

With this brief opening, perhaps your Honor would like to have me read some of the pleadings. I do not think it is necessary to read them all, because you see there are more than the usual number of pleadings, and they are largely repetitions.

The Court: I should not think it was necessary to read them. I think I have followed you, and I think I understand what the case is about.

Mr. Pillsbury: Perhaps, then, it would be just as well if I put on witnesses at this time, without referring further to the pleadings?

183 The Court: I should think, on your statement, I could follow you.

Mr. Blodgett: I think I ought to say that Mr. Warner [Henry E. Warner, Esq.] represents the cargo that was on the Bay Port; and he came in by an intervening petition, which Mr. Pillsbury neglected to state.

Mr. Pillsbury: Mr. Warner told me that he would not take part in the trial, so I did not go into that matter; but his theory is the same as that of the owners of the boat, and his libel is against the Canal Company.

WILLIAM WILSON (sworn).

(By Mr. Pillsbury:)

Q. 1. What is your full name, captain?

A. William Wilson.

Q. 2. And where do you live?

A. In New York.

Q. 3. What is your present occupation?

A. I am an instructor in navigation.

Q. 4. An instructor in navigation in what school?

A. At the Seaman's Church Institute.

Q. 5. In New York?

A. In New York.

Q. 6. You are a seafaring man, captain?

A. Yes, sir; I am.

Q. 7. And what has been your experience and training?

A. I have had forty years of it.

Q. 8. And what certificates have you?

A. Master's certificate.

Q. 9. Were you formerly on this whaleback, the Bay Port, when she was on the lakes?

A. Yes, sir.

Q. 10. In what capacity?

A. As chief officer.

Q. 11. What was the name of this whaleback at that time, do you remember?

A. The E. B. Bartlett.

Q. 12. And when was it that you were her chief officer?

A. In 1900.

Q. 13. How long were you the chief officer of the Bay Port?

A. Just one season.

Q. 14. Do you know when she came to the coastwise service?

A. Yes, sir; I do.

Q. 15. When was that?

A. 1907, I think, —'6 or '7,—1905.

Q. 16. Now, were there other whalebacks which were sister
184 ships of the Bay Port in service on the lakes at the time you were there?

A. Were there other what?

Q. 17. Other whalebacks of the type of the Bay Port?

A. Oh, yes,—yes, indeed.

Q. 18. How many were there?

A. Well, I should say about thirty or forty. She is one of the small ones, you know.

Q. 19. Will you describe the Bay Port? Tell us about her,—how she is built.

A. Well, she is built with a spoon bow and spoon stern, so to speak; in other words, a Cordova bow and stern. Engines aft. There is no bulkhead through in the cargo hold.

Q. 20. And how about her bottom; did she have a keel?

A. No, sir; perfectly flat on the bottom. She had ballast tanks, of course.

Q. 21. I was coming to that. Tell us about the ballast tanks.

A. Well, the ballast tanks would be about 36 inches,—probably
38 inches deep from her skin to her keel plate.

Q. 22. Where is that located?

A. On the bottom of the ship.

Q. 23. How about the water tanks; where were they located?

A. Well, the fresh water tank was——

Q. 24. I mean when she was on the lakes. It was all fresh water,
I suppose?

A. It was all fresh water, we just took it from the sea, so to speak,—took the water from the lake for the boilers and engine.

Q. 25. Where were those tanks; that is, the boiler and engine tanks,—where were they on the ship?

A. On the lake?

Q. 26. Yes.

A. We didn't have them on the lake.

Q. 27. You didn't have any tanks?

A. Yes, we had ballast tanks there, but we didn't use them, we didn't fill them with water at all except when she was light.

Q. 28. That is, you filled your ballast tanks when she was light, and when you did not need ballast on that account, you drew your water directly from the Lake?

A. Always.

Q. 29. Where were your coal bunkers?

A. They are right aft,—they are located right aft alongside of the boilers; have two side bunkers and athwartship bunker.

Q. 30. What was the capacity of the coal bunkers?

185 A. Well, by close figuring we could get three hundred ton-
in her bunkers. When they got her here they cut the bunker out for cargo.

Q. 31. Have you ever seen the Bay Port when she was in service on the sea?

A. Oh, yes, indeed,—yes, many a time.

Q. 32. Can you, of your own knowledge, tell us whether there was any difference in the way she was operated on the sea as to her ballast tanks than on the lakes?

A. Oh, yes; they cut the bunker out, the first thing they did; and then put surface condensers in her; and the after ballast tank or the after peak tank, as it is termed,—the sluice valve was taken out of that, where you could fill it from the sea on the lake, and it was closed up and made a fresh water tank for her boilers. She had to carry fresh water here on salt water, you know.

Q. 33. What was the capacity of that tank which you have just described, which was made into a fresh water tank when the boat came to the sea service?

A. Well, that tank would carry from ten to twelve thousand gallons of water if not more.

Q. 34. Will you describe the cargo space of the vessel?

A. The cargo space of the vessel was just one hold all the way through the ship from the bulkhead forward of the boilers—that is, the iron bulkhead—to the forepeak bulkhead which divided the chain locker from the cargo hold; the forepeak is really the chain locker.

Q. 35. When you were operating the boat on the lakes, what was the cargo that you carried principally?

A. Well, we carried iron ore, grain and coal.

Q. 36. And to what depth was it customary to load the boat,—to what draft?

A. Well, when I was first in them, that is, in 1894, we only loaded to 14 foot, 6 draft, because that was all the water there was over the sill at the Sault. But after they built the new lock we loaded to 17 foot, 6,—or 17 feet in the fall of the year,—loaded a little lighter in the fall of the year.

Q. 37. Why was that?

A. Well, bad weather; she would be carrying away the turrets out of her.

Q. 38. So that you have had experience with her loaded both at a little over 14 and 17?

A. Yes.

Q. 39. Was there any difference in her handling when she 186 was loaded to a draft of 14 and when she was loaded to a draft of 17?

A. Oh, yes, indeed.

Q. 40. Tell us about that. What was the difference?

A. Well, she wouldn't steer as well.

Q. 41. Which way wouldn't she steer well,—when she was loaded deeper or—

A. At 17 feet as she would at 14 feet, 6.

Q. 42. Now, captain, why was that?

A. Well, it was the way,—on the construction of the boat. She was built for a 14 foot, 6, draft, you know; and when you load a boat three feet deeper, why, she won't steer as well.

Q. 43. Would it have more effect on this boat than on the boat of

the ordinary type to load her heavier than the draft for which she was built?

A. Well, I don't catch that question.

[The question is read.]

A. Yes, it would.

Q. 44. What is the reason it would have more effect to load her heavier than she was built for?

A. Well, the reason is, that she has a spoon bow and she is quick on her helm, more so than a vessel with a straight stem,—than a steamer with a straight stem.

Q. 45. Would the absence of a keel have any effect on that?

A. Possibly it would.

Q. 46. When you were on the ship on the lakes, did you have any experience in the navigating of her in narrow waterways with or without currents?

A. Always with a current, all the way from Duluth down to Montreal.

Q. 47. Now, with reference to her handling when loaded beyond the depth of 14 feet, will you state what, if any, effect the current had?

A. Well, the current is liable to make her quick on her helm,—make her sheer unless she is handled properly,—unless the steamer is handled properly, unless the master keeps her under proper control.

Q. 48. Is that true even when she is loaded to a depth of only 14 feet?

A. Why, at 14 feet you could work her a little stronger on her wheel,—that is, a little more speed than you could at 17 foot, 6,—that is a certainty.

Q. 49. Now assume that she was loaded to 17 foot 6, in a 187 waterway on the lakes where there was a current, what effect would that overloading, as you have described it, have on her sheering in the current?

A. Well, she would sheer more loaded to 17 foot, 6, than she would at 14 feet, 6. Of course, it is up to the master to keep her under check, you know, keep her under control all the time, keep her going slow until he passes the dangerous spot, so to speak.

Q. 50. Now, captain, assume that this Bay Port on the 13th of December was loaded to a draft of 18 feet, 2 inches, loaded with coal; and that she was drawing 18 feet, 2 inches; that she had come from Newport News, Virginia, to Buzzard's Bay and had burned the amount of coal she would consume on that voyage and had used the fresh water from her after tanks without replenishing which she would use for that voyage, what would you say as to her being in proper, seaworthy condition to attempt to navigate the Cape Cod Canal?

A. Well, she would be by the head a little.

Q. 51. She would be by the head?

A. Yes.

Q. 52. Why?

A. Well, because they use the water from that after tank, and they have used the fuel right out from aft—both water and fuel are directly in the stern of her, with the engines and boilers and tanks—she would go by the head.

Q. 53. How much from those causes would you say she would be by the head?

A. Well, according to her steam, if she had steam in her forty-eight hours and loaded to 18 feet, 6, at Newport News—

Q. 54. 18 feet, 2.

A. 18 feet, 2.

Q. 55. Yes.

A. If she was loaded full forward—of course that is the reason they get all they can into her aft, of water, so they can carry a full cargo forward, or else they will have to go short a couple of cars forward; she would be by the head in about fifty hours' time—she ought to be by the head about fourteen inches and possibly sixteen or eighteen, according to the trip. I couldn't just give it—about fifty hours.

Q. 56. Now, what effect would that have on her being manageable or otherwise in such a waterway as the Cape Cod Canal?

A. Well, she would be pretty hard to manage even with 188 a tug ahead of her.

Q. 57. And in what respect would she be hard to manage; that is, what would she be liable to do?

A. To sheer.

Q. 58. Now, I will ask you the same question that I did before: Assuming that she was loaded to the depth of 18 feet, 2 inches, and that she was down by the head as you have testified, from the causes that you testified, what do you say as to her being in a proper condition to attempt to navigate a waterway such as the Cape Cod Canal?

A. Well, it is a pretty risky job with one of those pigs, you know—they call them "pigs"—pretty risky job with one of those pigs to go through the canal.

Q. 59. They call them sometimes "whalebacks" and sometimes "pigs"?

A. Yes.

Q. 60. Now, captain, what do you say as to whether that was a proper draft to load this vessel to, judging from your experience with her on the lakes?

A. Well, of course, I knew very well that when your boat is built for a draft of 14 foot, 6, and you load her to 18 foot, 6—

Q. 61. 18, 2.

A. —18, 2—it is just the same as carrying ice water in a milk pail—it is the same thing; you have to consider the size of your ship frames, in the first place—and she was not built to carry 18 feet, 2, draft—never was built for that, none of these small pigs were.

Q. 62. And I think you have already described how that would affect her manageability?

A. Yes.

Q. 63. That would tend to make her sheer?

A. Yes. Of course, we know they are overloaded today; everything is.

Q. 64. Now, captain, I will ask you whether, loaded to that draft, 18 foot, 2 inches, she was safe to handle, we will say, in such a waterway as the Cape Cod Canal?

A. Yes, she possibly would be safe with a good deal of care, with a towboat ahead of her—that is, in a swift waterway. I don't know just how swift the tide runs in that Cape Cod Canal, but I do know that I was aboard her sister ship, the Thompson, and I made a turn around a dock in Buffalo Creek—I had a tug ahead of me, and he kept pulling me away, but I kept going for the abutment, 189 and knocked her bow in—that is what happened to me.

Q. 65. Assuming that she was down at the head in the way that you testified, from the reasons that you have already stated, and she was loaded to this draft of 18 foot, 6, would you say that she was safe for such a waterway as the Cape Cod Canal?

A. No, I shouldn't think so.

Q. 66. Would your answer be the same even if she had a tug ahead of her?

A. Well, a man has got to go pretty nifty through one of those narrow waterways with a boat if she is a little by the head and steering bad. If the boat is able to steer well and you can handle her with the helm, you can go through almost anywhere in a swift waterway, because really that is what counts.

Cross-examination.

(By Mr. Blodgett:)

X Q. 67. Have you ever navigated the Cape Cod Canal?

A. Yes; I have been through there once or twice.

X Q. 68. Did you ever pilot a vessel through?

A. No, I never piloted anything at all.

X Q. 69. Were you on a passenger boat?

A. No; on one of those whalebacks.

X Q. 70. On a whaleback?

A. One of the tow barges.

X Q. 71. What?

A. One of the tow barges.

X Q. 72. What was the name of it?

A. I was through there in the Boravia.

X Q. 73. Who owned her?

A. Well, she was owned by the Sprague people.

X Q. 74. Sprague people?

A. Yes.

X Q. 75. One of this White Oak fleet?

A. Yes, one of the White Oak fleet.

X Q. 76. Was there a boat in that fleet named Boravia?

A. Yes.

X Q. 77. Are you sure about that?

A. Quite sure, because I lost her.

X Q. 78. Where did you lose her—in the canal?

A. No; outside.

X Q. 79. Was she loaded?

A. She was.

X Q. 80. How much coal did she carry?

A. 2,600 tons.

190 X Q. 81. How much did she draw aft, with 2,600 tons in her?

A. With 2,600 tons?

X Q. 82. Yes.

A. She would draw about 17, 3—17, 3 or 4—well, she wouldn't draw that really unless you put water in her.

X Q. 83. And how much would she draw forward with that cargo?

A. She would draw, forward—she would draw about—well, 16, 10.

X Q. 84. And she would carry 2,600 tons on that draft?

A. Yes, sir.

X Q. 85. Was she a sister ship to the Bay Port?

A. What?

X Q. 86. Was she a sister ship to the Bay Port?

A. Well, she was the same type, but she was not a steamer, as I said before.

X Q. 87. She was not a steamer?

A. No; she was a barge.

X Q. 88. Would she carry as much coal as the Bay Port on the same draft?

A. Oh, she would carry more.

X Q. 89. On the same draft?

A. Yes, oh, yes; sure she would, because she had no engines; she was the same size—the same length, the same beam.

X Q. 90. Do you know how much coal the Bay Port carried on the lakes when she had a draft of 17, 6, aft?

A. You couldn't—when I was in her, as far as I can recollect, I don't think we had any more than 2,500 tons in her.

X Q. 91. And with 2,500 tons of coal on the lakes, what was her draft?

A. On 2,500 tons we ran from Buffalo to Duluth—that is a run of a thousand miles.

X Q. 92. What was her draft?

A. What?

X Q. 93. What was her draft?

A. 17 feet.

X Q. 94. Are you sure about that?

A. Yes, I am, because we had no water in her tanks. Sure it would be that—less than that.

X Q. 95. Did you think it was safe to navigate, carrying 2,500 tons?

A. Yes, I considered it would be safe to navigate on 2,500.

X Q. 96. And she handled all right, did she?

A. She handled all right.

X Q. 97. And any difference in the draft would not make any appreciable difference so you could tell it in the handling, would it?

A. Well, of course it will.

191 X Q. 98. Do you mean to say that you, in steering a vessel, can tell whether she draws 18 feet or 19 feet by the way she handles?

A. Yes, I can.

X Q. 99. So that you do not have to watch the marks on your vessel to see how she is loaded, but you can tell by the way she handles whether she draws 17 feet or 18 feet?

A. You have always got to watch the marks of your vessel when you are loading her; and you know pretty well what she handles best at.

X Q. 100. Do you know what changes were made in this Bay Port after she came down to the ocean?

A. Yes; they took one of the bunkers out, I understand.

X Q. 101. Did you ever see it?

A. Yes, I have seen it once or twice.

X Q. 102. Have you ever been on board her since?

A. Yes, I have, many times.

X Q. 103. What?

A. Yes, I had, many a time.

X Q. 104. Do you know what repairs were made to her within three months of this accident?

A. Oh, no, indeed.

X Q. 105. You do not know anything about her condition at the time of the accident?

A. No, I do not.

X Q. 106. You do not know anything about the condition of her steering gear at the time of the accident?

A. No; I had nothing to do with the boat; I was not in that employ.

X Q. 107. Did she have a balanced rudder when you knew her?

A. A balanced rudder?

X Q. 108. Yes.

A. No.

X Q. 109. What did she have?

A. Just a common, ordinary quadrant.

X Q. 110. Didn't she have a rudder of some kind? Was it an ocean going rudder or a balanced rudder?

A. She has the same rudder that she had on the lakes.

X Q. 111. What do you call that kind of a rudder?

A. I don't know; you have got me on that.

X Q. 112. That pig type is a pretty common type of vessel, is it not, on the lakes?

A. Yes, they were at one time, but not today.

192 X Q. 113. And the last ten years there have been a good many of them down here on the coast?

A. Yes, sir.

X Q. 114. Now, you say that if she drew 18 feet, 2, when she left Norfolk, she would be by the head when she got up to the canal?

A. Yes, sir; she would.

X Q. 115. Why do you say that?

A. Because she had been using fuel there for fifty or sixty hours probably, and using water.

X Q. 116. Was anything said to you about her draft forward, by Mr. Pillsbury in his question, when she left Norfolk?

A. No; not that I know of.

X Q. 117. How do you know how she was trimmed when she left Norfolk, in answering the questions that Mr. Pillsbury gave you?

A. Well, the presumption is that when she left Norfolk or Newport News, drawing 18 feet, 2, she would be about ten inches by the stern.

X Q. 118. How much would she be by the head when she was up to the canal, if she was ten inches by the stern there?

A. She would be twelve to fourteen inches by the head probably.

X Q. 119. So that what water and bunker coal was used in coming up would raise her stern twenty-four inches, would it,—two feet?

A. That wouldn't be twenty-four inches.

X Q. 120. Well, if she were ten inches by the stern when she was loaded and left, and she was fourteen inches by the head when she got up to the canal, she would have changed her stern twenty-four inches, would she not?

A. No; she would not.

X Q. 121. How much would she change it?

A. Well, she would have just picked up that ten inches and went by the head fourteen,—that is, she would come up that ten inches.

X Q. 122. And go by the head fourteen. Well, now, if she hadn't been by the head when she got up to the canal, you do not think she would have been in an improper condition to go through the canal, do you, if the canal was in proper condition?

A. I didn't catch that question.

X Q. 123. I say, if she was not, as a fact, by the head when she entered the canal you would not say she was not in proper condition to enter the canal, would you?

A. Well, of course, if there was sufficient water in the canal, and there was not that heavy current that they speak about in the canal, why, the vessel might be all right.

X Q. 124. Well, assume that in the canal you had plenty of water.

A. Slack water?

X Q. 125. Slack water; yes.

A. Yes,—but you would have to go mighty slow with her.

X Q. 126. Suppose you had plenty of water and slack water,—if she was not by the head would you say she was not in proper condition to go into that canal?

A. I don't say that, sir.

X Q. 127. What?

A. She might be in proper condition to go through the canal with the help of a tug,—possibly.

X Q. 128. But as far as the Bay Port herself is concerned, there would be nothing improper in her entering the canal under proper conditions, unless she was by the head,—is that true?

Mr. Pillsbury: I think you ought to say what the conditions are.

Mr. Blodgett: With the proper quantity of water under her and slack water.

A. Yes, a man could possibly go through that ditch with the boat if she was by the stern a little.

X Q. 129. And that was a pretty dangerous ditch, was it not?

A. Well, I don't know; I have been through a few of them, and I don't see anything extraordinary about it except the sidewalks.

X Q. 130. Except what?

A. The sidewalks, the places where you make a line fast, that is all.

X Q. 131. And she wants plenty of water underneath her to go through, does she not?

A. As a rule, yes.

X Q. 132. And you would not think that an 18-foot depth was sufficient to take through a vessel drawing 18 feet, would you?

A. Well, no; that is pretty close to the bottom, you know, if she was drawing 18 feet, 2, in 18 feet of water.

X Q. 133. And when those vessels go down pretty close to the bottom, they smell the bottom and become unmanageable, do they not, so you can't steer them?

A. Yes, of course they do.

X Q. 134. And that causes them, when they get off a shoal spot, to sheer, does it not,—or with the current?

A. It does a little; yes.

194 Redirect examination.

(By Mr. Pillsbury:)

Q. 135. You said, captain, that when she left Newport News you would assume that she would be down at the stern?

A. Yes.

Q. 136. In a type of boat such as this Bay Port, this whaleback, is that condition to be expected at the time of her leaving port if she is properly loaded; that is, is this boat supposed to be somewhat up at the head?

A. Oh, yes, because her engines are aft, and they show up much larger than a barge.

Q. 137. Are you a pretty good drawer?

A. No; I am pretty poor as an artist.

Q. 138. Could you give us a little idea of what you mean——

Mr. Blodgett: I have got a picture here, Mr. Pillsbury. You can use this and probably give a better idea of it than anything he can draw. There is a picture of the Bay Port. I think that will be helpful.

[The picture is passed to the witness.]

The Witness: You see you have her loaded forward there now——

Mr. Blodgett: I won't bother to have that picture marked, unless your Honor thinks we had better have it marked.

Mr. Pillsbury: I will have it marked.

Mr. Blodgett: I want to be able to get it back.

Mr. Pillsbury: We will see that you do when the case is all over.

[The photograph is marked as "Canal Company Exhibit 1."]

Q. 139. Now, Captain Wilson, showing you the photograph Exhibit 1, you were going to make some comment about the boat. What did you want to say?

A. This boat is half unloaded or quarter unloaded now—about one-third unloaded. Now, when she is loaded, this guard strake comes right forward,—she is pretty well down forward there [pointing], but yet at the same time she is by the stern.

Q. 140. That is, when you describe an even keel with this boat, you would mean that she was somewhat down at the stern—

A. Yes.

Q. 141. —the way she was intended to be?

195 A. Yes. If she looks about on even keel, she would be by the stern to the average man. All those whalebacks are alike in that respect.

Q. 142. And that was what you meant by saying that she would be down at the stern 10 inches and down at the bow 14 inches; and yet there would not be the 24 inches that my brother Blodgett was talking about?

A. Yes.

Q. 143. Because it would start at the proper condition at the stern, as I understand it?

A. Yes, sir.

Q. 144. Now, I call your attention to the figures which appear on her side—white figures.

A. Yes.

Q. 145. Will you tell us what those figures are?

A. Those are her marks.

Q. 146. Marks for what—loading?

A. Loading; yes.

Q. 147. What is the highest number that you see there?

A. Well, I am a little weak in my eyesight.

Q. 148. Seventeen feet, is it not?

A. Looking through glasses. Yes, 17 feet.

Q. 149. Now, captain, where you have loading marks of that sort, are the highest numbers intended to indicate the extreme loading depths?

A. Yes—no, not altogether—no.

Q. 150. Well, what are they intended to indicate?

A. They are put there so that you can see where you want her; but, of course, there is no Plimsoll mark on this or anything of that kind. That is just put on there so we know—we can have her on even keel, because, as I say, she is different from a straight stem boat; and you are able to tell, when the ship is on even keel, in

loading, and that she hasn't a list one way or the other by the marks, because they are true.

Q. 151. Do you ordinarily expect to load a boat deeper than the highest depth that is shown?

A. Oh, no, not as a rule; no.

Q. 152. That is, it is intended to show by those marks the deepest depth that it is expected that the boat will be loaded to; isn't that so?

A. Well, she couldn't load over 17 feet 6, forward there, anyway, unless you filled her with water, I don't believe.

Q. 153. Well, similar marks appear aft?

A. Yes.

196 Q. 154. Do you recall whether those marks were the same when she was on the lakes?

A. Just the same.

Q. 155. Just the same as shown in the photograph?

A. Just the same.

Q. 156. One question I mean to ask you, captain, and that was, what sort of a handling boat this whaleback was when she was loaded to a depth of 14, 6 and was not down at the head?

A. Oh, she would load pretty fair—she would handle pretty fair, alone—handle pretty fair with a tow. They never allow those steamers to go without a tow on the lakes, because they steer bad—a man couldn't steer them, they would go all over.

Q. 157. Well, we have got at it in a little different way, but that is what I was going to ask you. How did she handle without a tow, even when she was properly loaded?

A. Well, she handled a little swift on the helm. They are hard to steer.

Q. 158. That would be so even when she was properly loaded?

A. Yes. That is the reason they put tows behind them all the time—never allowed one of these pigs to go alone, because you couldn't handle them in the rivers and pass another boat without checking her right down to dead slow and crawling along.

Q. 159. Now, assume that the Bay Port had no tow when she was coming into this canal, that she was without a tow—

A. Well, I say, she wouldn't steer well. If she had a tow behind her, somebody to hold her, why, she would steer.

Q. 160. You interrupted me, but that is all right; we are getting along first-rate. Assume that she had no tow when she came into the canal, that she was loaded to a depth of 18 feet, 2; would you say that, without a tow, and loaded to that depth, she was in proper condition to attempt to navigate the canal?

A. Oh, no—no. She would get through all right, as I said before, if the man had a towboat ahead of her; or if he went dead slow, he might possibly go through.

Q. 161. Of course, we may all of us get by, but would you consider it good seamanship; would you consider the boat in proper condition to go through?

197 A. I would not go through the canal with the Bay Port or any of those pigs—steam pigs—alone. Of course, the other man can; I wouldn't—I never would.

Q. 162. Would you, or would you not, think that she was in proper condition to attempt to navigate the canal, loaded in the way I have described and without a tow?

A. No, I would not consider her in good condition to go through that canal.

Recross-examination.

(By Mr. Blodgett:)

X Q. 163. When you speak of the Bay Port, I suppose you speak of the type of vessel, of the pig type?

A. Yes, sir.

X Q. 164. And all of these whaleboats—your judgment would be just the same in reference to all of them; there was not anything in particular about the Bay Port that made her any worse steering than any other pig?

A. Oh, yes, indeed. I was in the same type of boat—450 feet long, and she was an entirely different boat altogether.

X Q. 165. I say, the pigs of the same size as the Bay Port?

A. Well, they are all bad steering boats.

X Q. 166. They were all the same?

A. They were only 256 feet long, you know.

X Q. 167. And all the pigs that came down on the coast, of that size, were all the same?

A. Yes, they were all the same.

X Q. 168. They are all equally bad steering boats?

A. They are not good steering boats, alone.

X Q. 169. Not good steering boats?

A. No, not at all.

X Q. 170. You say that this boat could not go down lower than 17 feet, 6, forward?

A. I don't think she could unless you had—you could put her down with iron ore, but you couldn't put her down with coal.

X Q. 171. And with a cargo of 2,400 tons, from your knowledge of the vessel, what depth would she be loaded to forward and aft?

A. She would load to about 17 foot, 4, forward—wouldn't she?

X Q. 172. And about what aft?

A. Well, you could put her down aft, with water, to 18 feet, 2; you say that she was 18 feet, 2. That indicates you could put her down to 19 feet.

198 X Q. 173. What?

A. You might possibly be able to put her down to 19 feet.

X Q. 174. Aft?

A. Yes, you could, I guess, at that.

X Q. 175. And that would be the best way to handle her, would it not, to have her down aft?

A. Yes; sure.

X Q. 176. And if you were going to have her 17 feet, 6, forward, or 17 feet, 4, forward, you would want her down 18 feet, 6, or 18 feet, 4, aft?

A. Yes. By the time you have ran fifty or sixty hours, you take your water out.

X Q. 177. You would want to load her that way if you were going to load her the best way?

A. Yes; probably.

X Q. 178. And if she drew 18 feet, 10, and 17 feet, 6, when she left Norfolk, that would be the best way to load her, would it not?

A. Well, I wouldn't say that would be the very best way to load her.

X Q. 179. Well, you can't suggest any better way to load her than that, can you?

A. No, you couldn't. You could load her like that, but she wouldn't be in any kind of shape at all; you would have the water on the engine room floor almost from the fresh water tank.

X Q. 180. From the fresh water tank?

A. Yes, from the fresh water tank. The men's rooms are right on top of the tanks, and that water would be sloshing right up on the rooms. We did that two or three times.

X Q. 181. Suppose you filled the water tank full, so it didn't slosh around in the engine room or any of the other rooms?

A. You couldn't fill it full—not any of those tanks are properly caulked.

X Q. 182. If you fill it as full as you could safely, would that be the best way to load the ship?

A. Yes, I think it would, at that.

X Q. 183. You speak about her having a tow—what do you mean; having a tug ahead of her, towing her on a hawser?

A. Yes.

X Q. 184. Not alongside?

A. Well, you mean going through the canal?

X Q. 185. Going anywhere. You said they wouldn't allow 199 them to navigate out on the lakes, because they would yaw around so without a towboat?

A. No—they always gave them a tow—these canal barges to tow, because they could steer better.

X Q. 186. Oh, gave them canal barges to tow?

A. Yes.

X Q. 187. That is, they towed other vessels?

A. Yes.

X Q. 188. Besides carrying their own cargo?

A. Yes, indeed.

X Q. 189. You don't mean they had to be towed?

A. Oh, no, except in port; in port they are usually towed, and through creeks.

X Q. 190. And if they were to be towed, a tug would go ahead of them and tow them?

A. Yes, indeed.

X Q. 191. On a short hawser, I suppose?

A. Short hawser.

Mr. Blodgett: That is all.

Mr. Pillsbury: That is all, thank you.

WILLIAM T. LEWIS (sworn).

(By Mr. Pillsbury:)

Q. 1. What is your full name, Captain Lewis, please?

A. William T. Lewis.

Q. 2. And where do you live?

A. Buzzard's Bay for the past three years.

Q. 3. Buzzard's Bay for the past three years. What is your occupation?

A. Master of tugboat.

Q. 4. Can you speak a little louder so we can hear?

A. Master of a tugboat.

Q. 5. Are you a licensed pilot for the canal waters?

A. Yes, sir.

Q. 6. Licensed by the United States Government?

A. Yes, sir.

Q. 7. Referring to the 13th of December, 1916, when the Bay Port attempted to navigate the canal, did you have anything to do with the ship on the 13th.

A. No, sir.

Q. 8. Did you see the boat on the 13th?

A. Yes, sir.

Q. 9. Where was she when you first saw her?

A. At Wing's Neck.

Q. 10. And where were you?

A. On the tug Dalzelline.

Q. 11. Was that the tug that picked her up to help her through the canal?

A. Yes.

Q. 12. And were you on the tug Dalzelline during the progress through the canal until she struck?

A. I was.

200 Q. 13. What were you doing on the tug?

A. I was going through to Sandwich to get a steamer to bring back.

Q. 14. You were merely a passenger on the tug?

A. Yes, sir.

Q. 15. Tell us, captain, in your own way, what you observed from the time the vessel started to enter the canal, or from the time that you first saw her, up to the time she struck, tell us the story as you observed it.

A. Why, I didn't observe much of anything excepting that after we struck the canal the vessel steered kind of bad.

Q. 16. At what point did you notice that she began to steer bad?

A. I couldn't say just at what point.

Mr. Blodgett: What day is this?

Mr. Pillsbury: This is on the 13th.

The Witness: She made a few sheers. but not very bad, until she got up to where she struck.

Q. 17. Where was she when she made her first sheer, about?

Mr. Pillsbury: Perhaps this is a good time to put up this big map.
[A map is placed upon the rack.]

(By Mr. Pillsbury:)

Q. 18. I was trying to ask you about where the Bay Port was when she took her first sheer. Can you indicate on this map about where she was when she began to handle badly in that respect?

A. I think it was just before she got to the railroad bridge, the first one on entering the canal.

Q. 19. I beg pardon?

A. Just before she got to the railroad bridge, on entering the canal, is where she commenced.

Q. 20. What was done then, if anything, to correct the sheer?

A. Why, my attention was called to the tugboat working harder, full speed ahead. That is the way my attention was called to her.

Q. 21. And was it successful in straightening her out?

A. It was.

Q. 22. Now, will you describe the progress of her, especially as to where she was when she took another sheer, if she did?

A. I paid no attention until we got through the Bourne bridge. Then I heard some bells go again, and I saw the ship was taking another sheer, which was broken.

201 Q. 23. On which side of the Bourne bridge?

A. Just by the Bourne bridge to the eastward.

Q. 24. Above it?

A. Yes.

Q. 25. Now, will you describe the course of events up to the time she struck, from then?

A. Why, she seemed to go along very good; that is, I didn't hear nothing any more until we got up—I can't tell you the sections, but just before she struck,—I heard an alarm whistle blown and I looked out and I saw the steamer was sheering to the south bank. The tugboat was rung ahead at full speed, but couldn't break the sheer. She struck the south bank and grounded and swung along broadside.

Q. 26. You say you cannot indicate by section where that was?

A. I can by looking.

Q. 27. All right, will you just look there and tell us where that was?

A. It was about there [indicating on the map], I should say between 230 and—about 250.

Mr. Blodgett: About there?

Mr. Pillsbury: About 250, he says. Does that correspond with yours?

Q. 28. Can you tell us where it was with reference to the Collins farm?

A. No; I am wrong. Is that [pointing] the highway? May I ask if that is the highway?

Mr. Pillsbury: Mr. Mahony, you are more familiar with this.

The Witness: That indicates the highway, doesn't it [pointing on the large map]?

Mr. Mahony: I imagine so; yes.

The Witness: Well, then I think it would be between 230 and 240, if that is the highway.

Mr. Blodgett: It is on 230, according to this plan.

Q. 29. You think it was between 230 and 240?

A. Right near that, judging by the highway; that is the only way I can tell on that line.

Q. 30. Go ahead and tell us what happened after she struck.

A. She swung up alongside of the bank and commenced to fill with water.

Q. 31. That was about what time?

202 A. I think it was 2.10 actual time,—2 o'clock, something like that. The tugboat and the steamer commenced to blow a whistle for distress,—distress whistles; and they sent the tug Stuart and tug Hazelton there to assist. And in the meantime we got the tug alongside of the steamer to find out if there was any way we could pump on her. We found she had no way of pumping except with her own pumps,—no way for putting a siphon whatsoever. And then—

Q. 32. Well, now, on that point, what is the usual structure which enables a siphon to be put in?

A. Most generally they have a pump-box or pump-well, so that you can put an extra pump in, something to pump out the vessel.

Q. 33. All right, go ahead.

A. The other two tugboats arrived, and Captain Geer arrived also at that time, and then we tried to pull her off. We pulled on her, but we couldn't move her; she was fast. So then it was around 5 o'clock or something, and there was word come up there that Captain Joe Lewis would be in the neighborhood after 6 o'clock.

Q. 34. Who was Captain Joe Lewis?

A. He was in charge of the wrecking plant.

Q. 35. Scott Wrecking Company?

A. Scott Wrecking Company, yes,—that he would be there about that time, and we were to go under his orders from the time he got there, to do whatever he said.

Q. 36. Who told you?

A. That was the orders that came from Captain Geer.

Q. 37. Now, Captain Geer was manager of the Pilots' Association, was he not?

A. Yes, sir.

Q. 38. And was also an officer of the Cape Towing Corporation?

A. Yes, sir.

Q. 39. You were a member of the Pilots' Association?

A. I was.

Q. 40. Did Captain Joe Lewis arrive?

A. He did.

Q. 41. At what time?

A. I can't say. It was in the neighborhood of 6 o'clock, but I don't know exactly when.

Q. 42. What did he do in the way of giving orders to anyone in your hearing?

A. Why, I told him what our orders was, and he told me to
203 tell the tug,—one tug to lay on her bow and another tug to lay on her stern and keep working so as to keep her up against the bank on a rising tide that night.

Q. 43. When you say you told him what your orders were, do you refer to the order to take orders from him?

A. Yes, I told him that.

Q. 44. All right, go ahead.

A. And the two tugboats placed themselves; the Stuart was on the steamer's stern and the Hazelton was on her bow, and we left them working ahead on the steamer, holding her up against the bank.

Q. 45. What time did you leave?

A. I think it was near 7 o'clock,—half-past 6 or 7; I don't know exactly. It was after changing crews time,—the crews are changed, you know, about that time.

Q. 46. When did you next see the boat?

A. The next morning.

Q. 47. About what time?

A. Well, I couldn't say; I guess 7 or 8 o'clock,—7 o'clock.

Q. 48. What was the condition of affairs then?

A. Why, she laid in practically the same position, a little more water in her than she had the night before.

Q. 49. Who was there?

A. The tug Stuart and the tug Hazelton was there when we arrived on the Dalzelline in the morning.

Q. 50. Was Captain Joe Lewis there?

A. He went up with us, I think,—if I am not mistaken, he went up with us on the tug in the morning, or else he went up on the launch; he was there, at any rate, at the time we got there.

Q. 51. What took place then? Just tell it in your own way.

A. Well, the tug Hazelton wanted coal; and I was on the Hazelton, and I called over to Captain Joe Lewis and told him that the tug Hazelton wanted coal; and he said we could go through and get it; and if we saw the lighter Salvor up there, to get her and bring her back without getting coal,—that he was in a hurry to get her there. We went over to the eastern end after the coal, and we found the Salvor just coming in and hooked right on and took her right back to the wreck. We got back there and placed it on the port side of the steamer about amidships, and they started to take coal out
204 of the steamer, when the gear was not just right or something, and they stopped working to change the gear,—they had probably taken out half a ton, something like that, or a ton in the meantime. I asked them what they were going to do with the coal.

Q. 52. You asked whom?

A. Captain Lewis. Why, he said they had to get it out to lighten the ship up a little bit and break the list; the ship was listed over,—

and to raise her bow up a little. So I asked him, if the Hazelton had to have coal, why we couldn't get coal up out of the steamer for the Hazelton. And he said we could as soon as they got the gear to working on the lighter. So I went back aboard of the Hazelton and had just got in the pilot-house when some one hollered the steamer was afloat.

Q. 53. What time was that?

A. I don't know exactly. I should say somewhere around—I should say 10 o'clock.

Q. 54. Where were the different people at that time; that is, where was Joe Lewis?

A. He was aboard the Salvor, the lighter.

Q. 55. She was alongside?

A. Alongside.

Q. 56. And where was the master of the Bay Port, Captain Hammett?

A. Why, he was on his own vessel, I think; I won't be sure. At the time she floated, he was aboard of his own ship.

Q. 57. Where were you?

A. I was aboard the tug Hazelton.

Q. 58. In what condition were the tugs at that time; how were they placed, and what was the general situation in relation to the tugs and the steamship?

A. The lighter Salvor lay about amidships of the steamer, with the tug Stuart outside of the Salvor, giving her water, pumping water into the Salvor. The other two tugboats lay on the port bow of the steamer, side and side.

Q. 59. Which way were the tugs facing?

A. Facing the westward.

Q. 60. Facing the westward?

A. Yes. I say they were side and side,—I wouldn't be positive of that; they both laid on the bow of the steamer; they might have been one hanging out of line,—I won't be sure.

Q. 61. Were all the tugs facing westward?

A. Yes, sir; all facing westward.

Q. 62. Were their engines running?

A. No, none of their engines were working.

205 Q. 63. Was the engine of the Bay Port running?

A. Not at that time; no.

Q. 64. When you heard this shout that she was afloat, state what you did and what you observed.

A. Why, I jumped aboard of the Bay Port and walked back; going back towards the stern I met the captain of the Bay Port on the deck.

Q. 65. Captain Hammett?

A. Hammett. And I asked him, did he have steam on his engines? And he replied, "Yes." I said, "You better come ahead as soon as you can, hard astarboard, and straighten up your boat; we are going on the other bank." And Captain Joe Lewis hollered something to me, but I couldn't understand what he said. And they let loose the lighter, and the Stuart took the lighter from

alongside of the steamer; and the Dalzelline turned around and got a hawser on the steamer. The Hazelton was trying to——

Q. 66. Where was the steamer at the time when the Dalzelline got a hawser to her?

A. Very near the middle of the canal; just practically in the middle of the canal, drifting to the eastward.

Q. 67. Facing which way?

A. East. The Hazelton was turning around, to get around and get alongside of the steamer to try to help to steer her. The steamer had about a two-foot list, and was way down by the head when she floated; I should judge they were two foot and a half by the head and listed probably two foot to port, and commenced to run a very zig-zag course.

Q. 68. Just a minute. You have got to the point of your saying to the captain, "Have you got steam on your engines?" and he said "Yes." What happened then?

A. He started his engines ahead and steadied his boat up.

Q. 69. Now, continue.

A. By that time I was back on the bridge with the captain, and we stopped her engines and let her drift as much as we could, because we couldn't do nothing with her, she was drifting from one side to the other. We got up about 1,500 feet to the westward of the ferry, when she took a sheer for the lighter Trilby, which was working there. We broke that sheer with the towboat and her own power.

206 Passing the ferry she took a slight sheer to the south bank, very slight. We broke that; and about 50 feet or 75 feet further on she took a sheer to the north bank which we couldn't break; we couldn't do anything with her at all; her bow went up on there, and broke a hole in her bow, and her stern swung across. I told the captain,—I jumped to stop his engines so as to save her propeller and rudder; I was afraid the propeller and rudder would strike the other bank, and as soon as her stern struck,—it didn't strike very hard,—her bow swung off, and I told him to go ahead full speed. My idea was to try to get out of the canal as far as we could. In the meantime the Hazelton had just got to us as we sunk.

Q. 70. Can you indicate on the map the point that she struck the second time, as you have described?

A. About in there [indicating on the large map]. This is kind of a hard map for me; I can tell better on a chart; this is more of a land map.

Q. 71. Is this more of a sea map than that one [passing the witness a chart]?

A. She struck about over here, I should say.

Q. 72. Where would that be on this map [referring to the large map on the rack]?

A. In the neighborhood of station 175 to 176.

Q. 73. Where was Captain Joe Lewis during this time after she went off and struck as you have described?

A. Aboard the lighter Salvor.

Q. 74. Did he follow along after you; did you see him on the scene?

A. Why, yes, after we were sunk he got there?

Q. 75. How soon after?

A. Oh, fifteen or twenty minutes.

Q. 76. And what took place then?

A. Why, I couldn't say what he done at the time being. I was taken off of the steamer and went down to the ferry; Captain Geer was there and Commodore Miller.

Q. 77. After he got there did you hear him give any orders or say anything in relation to the situation?

A. After the ship was sunk?

Q. 78. Yes.

A. No; I was not there at the time he arrived.

Q. 79. What was the occasion, Captain Lewis, of your being where you were on that day before the ship went off? You have told us that you were there.

A. Merely a sightseer.

Mr. Blodgett: Sightseer?

207 The Witness: Sightseer, yes.

Q. 80. And by whose orders, or at the request of whom, did you get on to the ship when she floated off in the way that you have described?

A. Nobody's, only my own.

Q. 81. To help what you could in the emergency?

A. Yes, sir.

Q. 82. What, if anything, did Captain Hammett do or say when the boat had struck the bank in the way you have described?

A. You mean the last time she struck the bank?

Q. 83. Yes.

A. Why, we both,—I don't know as anything was said,—we both stayed there on the bridge until the bow was under water, and we both got off as soon as we could.

Q. 84. You asked me if I referred to the first time. If there was anything that you did not state about the first striking, that he did or said, I wish you would state it.

A. I don't know anything about the first striking,—what he said; I was not aboard the steamer.

Q. 85. Was the Bay Port, from the time she went off the bank as you have described up to the time she struck, under control?

A. No, sir.

Q. 86. Will you describe a little more in detail what her conduct was from the time she went off until she struck in the way you have indicated?

A. Why, she was continually sheering and drifting from one side to the other; she had no headway to amount to anything excepting the drift of the tide.

Q. 87. The tide was with her at that time, was it not?

A. Yes, sir.

Q. 88. And the day before the tide was against her?

A. Against her; yes.

Q. 89. Would the fact that she was down at the head in the way that you describe have a tendency to cause her to sheer?

A. It would.

Cross-examination.

(By Mr. Park:)

X Q. 90. What had been your experience, captain, before you went down to the Cape Cod Canal, on vessels?

A. All classes of vessels in New York Harbor.

X Q. 91. Mostly tugboats?

A. Yes, sir; principally.

208 X Q. 92. And when did you go down to Buzzard's Bay to remain there permanently?

A. November the 15th, 1915.

X Q. 93. And you were a regular branch pilot of the Cap Cod Canal?

A. No; I went in charge of the tug Stuart when I first went there.

X Q. 94. You were at the time the Bay Port went ashore?

A. Yes, I was then.

X Q. 95. Were you the day captain or the night captain of the tug Stuart?

A. Day captain.

X Q. 96. And at the time the Bay Port first went ashore on the 13th of December, 1916, were you at that time acting as pilot at the canal, or as day or night captain of any of the tugs?

A. I was pilot for the Pilot Association.

X Q. 97. Did you assume duties as master of any steamtugs at that time?

A. No, sir; not at that time.

X Q. 98. When you left Buzzard's Bay in the steamtug which had the Bay Port in tow on the 13th, I understood you to say you were going to Sandwich in order to pilot a steamer through to the westward?

A. Yes, sir.

X Q. 99. That is, you were going on to the steamer and act as her pilot going through?

A. I was.

X Q. 100. Would that steamer necessarily have one of the three tugboats that were regularly employed in the canal to assist her in going through or not?

A. No, sir.

X Q. 101. She was going through under her own steam, and with you in charge?

A. Yes, sir.

X Q. 102. Among the pilots, who was the head pilot?

A. There was no head pilot.

X Q. 103. If three or four of you were together, and some action was to be done, who would assume control and authority?

A. Captain Geer.

X Q. 104. Well, Captain Geer was the superintendent, was he not?

A. Yes, sir.

X Q. 105. Well, eliminate Captain Geer. If two or three of you pilots were together, and some action was to be done, who would assume control or say what should be done?

A. We never had that question. I don't know how it would come out.

X Q. 106. Were you not head pilot at that time of the canal and made so by Captain Geer, the superintendent?

A. No, sir.

Mr. Pillsbury: Pardon me. Superintendent of what?

Mr. Park: Well, he occupied so many offices down there, I scarcely know that myself.

Mr. Pillsbury: That is exactly the point.

X Q. 107. What was he the superintendent of; do you know?

A. Cape Cod Canal.

X Q. 108. What else?

A. That is all he was superintendent of that I know of.

X Q. 109. Well, did he have anything to do with this Cape Towing Corporation that you speak of?

A. I believe he was manager of it.

X Q. 110. You believe he was manager. Do they have the same office?

A. No, sir; separate offices.

X Q. 111. Well, did he exercise control over the steamtugs from one office and over the affairs of the canal from another, or did he do it all from the same office?

A. The tugboats was handled in one office, and the canal business in another.

X Q. 112. Two offices in the same building?

A. No, sir.

X Q. 113. Where were the affairs of the tugboats or the Cape Towing Corporation handled, as far as you know?

A. The office is in back of the other office, or just to the right of it.

X Q. 114. Any telephone connection there?

A. Yes, sir.

X Q. 115. And the one for the canal is in the front part?

A. No, sir; in the other office.

X Q. 116. Another office. Do you know, as a matter of fact, when Captain Geer would call for a tugboat, that he would go to the Cape Towing Corporation office to call up, or not,—do you know?

A. These tugboats had no calls except from outside.

X Q. 117. Well, when Captain Geer wanted to speak to anybody?

A. He used the canal private line.

X Q. 118. The canal private line?

A. Yes; sir.

210 X Q. 119. Now, captain, you had been down to Sandwich, and were on the tugboat that took the Salvor in tow from Sandwich back to the wreck on the 14th?

A. Yes, sir.

X Q. 120. That was the morning of the 14th, was it not?

A. It was.

X Q. 121. The Salvor is a little wrecking vessel belonging to T. A. Scott Company, upon which was rigging gear and material which had been towed from Boston down to Sandwich?

A. She was.

X Q. 122. In tow of the steamtug Pallas?

A. I think so; I don't remember the tugboat.

X Q. 123. And you took the place of the steamtug Pallas and towed her up to the wreck?

A. We took the place of the boat that brought her there.

X Q. 124. What time did you get to the wreck?

A. That, I couldn't say, but I think somewhere around 8 o'clock; probably half past 8. I didn't make no record of the time.

X Q. 125. When the Salvor was placed along the port side of the wreck, was the tugboat upon which you were upon her outside?

A. No, sir.

X Q. 126. Where was it?

A. We backed away from her and laid under the bow of the steamer.

X Q. 127. Was there any other steamtug on the bow of the steamer?

A. Dalzelline.

X Q. 128. Dalzelline?

A. Yes, sir.

X Q. 129. Do you mean to say that when that boat came off the Hazelton was not upon the port quarter of the Bay Port?

A. She was on the port bow of the Bay Port.

X Q. 130. And both steamtugs were on the port bow?

A. Yes, sir.

X Q. 131. Where was the steamtug Stuart?

A. Outside of the lighter Salvor.

X Q. 132. After you got back with the Salvor, had you been on the Bay Port before she came off?

A. Yes, sir.

X Q. 133. How did you get aboard?

A. From the bow of the Hazelton.

X Q. 134. You say you were on the Hazelton when she came off?

A. Yes, sir.

211 X Q. 135. Did you expect she was coming off?

A. I didn't give it a thought.

X Q. 136. You didn't give it a thought? Is your recollection as good now as it was when you gave your evidence before the United States local inspectors for that district? Is your recollection as acute now as it was then?

A. Might be.

X Q. 137. Do you remember what you told them in regard to that?

A. No, sir.

X Q. 138. You have no recollection at all. Was this question asked you by one of the inspectors:

"Q. Have you any knowledge of what took her off the bottom?

A. No, not unless the sand wore away. She came off before anybody expected she would come off."

Do you remember telling the inspectors that?

A. Well, she came off about three hours——

X Q. 139. Do you remember telling the inspectors that?

A. No, I don't remember that. I probably did.

X Q. 140. You have no recollection of it?

A. I probably did.

X Q. 141. Do you remember the inspectors asking you this question:

"Q. Do you feel that the second striking, which resulted in the sinking of the vessel, was caused by negligence or inattention or unskilfulness by any licensed officer in charge of that vessel?

A. I do not. I think everybody done all that was possible to do. This ship came off so sudden there was no time to make up your mind what to do."

Do you remember saying that?

A. I don't remember what I said. I suppose I did, at that time.

Mr. Pillsbury: Is this admissible?

Mr. Park: This was the testimony before the local inspectors.

Mr. Pillsbury: I assume you have a correct copy, but I have an objection to it on another ground. He was not asked to characterize the matter in his direct evidence; and if I had attempted to ask him what the cause was, I assume it would be ruled out. I do not quite see why the same question should be admissible on cross-examination.

212 Mr. Park: Well, for the sole purpose of contradiction and to test his recollection of what happened.

Mr. Pillsbury: If it is for the sole purpose of testing his recollection——

Mr. Park: Yes, and his credibility,—both. It is usual to refer to it.

Mr. Pillsbury: His characterization as to whether anyone was negligent or not could not be of very great assistance to the court.

The Court: No.

Mr. Park: This is the original copy that came from the board.

X Q. 142. Do you remember this question being put to you:

"Q. Where is this hole on the port side?

A. I think it is right under the bow. They seem to be all very quiet about that, the wrecking crews are kind of keeping that. In

fact, when she came off that morning I didn't think the ship was due to come off for three hours, because she went on at very near high water and she had this list and the tide wasn't up within a couple of feet of what it was when she went on."

Do you remember making that reply to the United States local inspectors?

A. I remember of always stating it the same way. I don't remember just making it at that time.

X Q. 143. Are those statements true?

A. Yes.

X Q. 144. Your answers to these questions put to you by the local inspectors you say are true?

A. Yes, except—I make an exception of that port bow; I don't think I ever said there was a hole in her port bow.

X Q. 145. Now, captain, you seem to be hazy in your recollection of what occurred between you and Captain Joseph Lewis. At the time you went on and assumed charge of this boat, or when you went on to her deck, for what purpose did you leave the Hazelton and go on the deck of the Bay Port as she came off?

A. To assist,—anything that I could.

X Q. 146. Did you not go on there for the express purpose of piloting her down to the east end of the canal?

A. No, sir.

X Q. 147. You did not? Have you ever made any statement to that effect?

A. No, sir.

213 X Q. 148. To no one?

A. Not as I remember of.

X Q. 149. If you have made such a statement, is such a statement true or not?

A. It is not true that I had any intentions of,—or ordered aboard of the steamer.

X Q. 150. I did not ask you about "ordered." I asked you if you went on there with the intention of piloting her down to the east end of the canal?

A. No, sir, I did not.

X Q. 151. If you ever made any such statements, those statements are not true?

A. No, sir, they are not true.

X Q. 152. Immediately after the accident were you called upon to make a report to the superintendent of the canal, Captain Geer, about this accident?

A. No, sir.

X Q. 153. Did you make any report to Captain Geer?

A. Only a verbal report.

X Q. 154. Did you ever make out any written report to Captain Geer?

A. No, sir.

X Q. 155. Did you ever make a written report to anybody?

A. Yes.

X Q. 156. To whom?

A. Commodore Miller.

X Q. 157. When was that?

A. A few days afterwards; I don't know when,—a day or two after.

X Q. 158. Have you got a copy of that report?

A. No, sir.

Mr. Park: I call upon counsel upon the other side to produce the report.

Mr. Pillsbury: I have never seen the report. Do you claim it is inconsistent with what he has testified?

Mr. Park: We are entitled to see it and see whether it is inconsistent or not.

Mr. Pillsbury: I don't think so,—not by way of contradicting the witness, unless you intend to show he has made statements inconsistent with his evidence.

Mr. Park: We have a right to call for the report which the master of a boat has made to the owners of the boat in regard to any collision.

The Court: Of course you have, and they may produce it or not.

214 Mr. Pillsbury: I will produce it if I have it. I have grave doubts whether I have it. I am informed we have no such report.

Mr. Park: I understand counsel to say they have got statements this man made to Commodore Miller.

Mr. Pillsbury: We have no such report as you have asked for. We have no written report, signed by this man, to Commodore Miller or anybody else. I have no objection to your asking him what he reported to Commodore Miller, but I can't help you on that because I haven't got any report.

X Q. 159. You made out a report of some kind to Commodore Miller?

A. I dictated it,—that is, the typewriter,—I made a statement to Commodore Miller, and the typewriter took it down.

X Q. 160. And you signed it?

A. Yes.

X Q. 161. When was that?

A. I couldn't say; it was a few days after the accident.

X Q. 162. And you never made out any report to Captain Geer, the superintendent?

A. No, sir.

Mr. Pillsbury: I will be very glad to produce what he refers to.

Mr. Park: To Commodore Miller?

Mr. Pillsbury: This stenographic record, as it apparently is, which he said he signed. Do you want it?

Mr. Park: Yes, anything you have got. I will go on in the meantime.

X Q. 163. Do you recollect that, when you went on to the bridge of the Bay Port after she came off, you gave orders to Captain Lewis, who was on the Salvor, to cast his lines off from your boat?

A. No, sir.

X Q. 164. Do you say you did not do it?

A. I did not.

X Q. 165. Did you order the tug Stuart to take the Salvor in tow and to look after her?

A. Yes, sir.

X Q. 166. Do you remember, when she came off, and Captain Lewis was upon the Salvor and you were upon the Bay Port, that he told you, "Captain, she is up to you now," and you made the reply, "I have got her?"

A. No, sir.

X Q. 167. Nothing of that kind occurred?

A. No, sir.

Mr. Pillsbury: I produce, in consequence of the request, 215 the statement headed: "Statement of W. T. Lewis, Buzzard's Bay, Mass., December 22, 1916," and signed "William Lewis."

Mr. Park: I haven't had time, your Honor, to look at this.

X Q. 168. Is that your signature?

A. Yes, sir.

Mr. Park: I would like to look this through without taking up the time of the court now.

X Q. 169. You distinctly declare that no such conversation as I have referred to occurred?

A. Not that I heard.

X Q. 170. Did you know on the morning of the 14th a diver had been there, and he had found the leak and had plugged it up and stopped it on the starboard side of the ship?

A. So I had been told.

X Q. 171. Did you know the steamer's pumps were gaining on the water?

A. I was told they was.

X Q. 172. Captain Joseph Lewis was on the Salvor at the time she came off?

A. He was back and forth on the Salvor and on the wreck.

X Q. 173. Captain, having reference to your testimony before the local inspectors, in which you stated she came off unexpectedly, I will ask you now, do you recollect now that she did come off unexpectedly and before high water or not?

A. She came off pretty near two hours, or something like that, before the tide was as high as it was when she went on.

X Q. 174. Did you personally expect her to come off at that time?

A. No, sir, I did not.

X Q. 175. So the statement you made to the inspectors is correct?

A. It is.

X Q. 176. Did you give any orders to the other tugboats after she came off?

A. I don't know as I did, any more than to the Stuart.

X Q. 177. You say that the Hazleton did not get down to your vessel until about the time she struck the second time?

A. Just before she struck.

X Q. 178. Did she render any assistance at all?

A. Not a bit.

X Q. 179. Did any of the tugs render any assistance after she came off the bank in order to turn her around and get her straight?

A. The Dalzelline.

216 X Q. 180. At the stern or the bow?

A. At the bow.

X Q. 181. No boat was at the stern assisting her at all?

A. Hadn't got there yet.

(By Mr. Blodgett:)

X Q. 182. Captain, as I understand, on the 13th you were on the tug that was towing the Bay Port through?

A. Yes, sir.

X Q. 183. You were not in charge of the Tug?

A. No, sir.

X Q. 184. How did you happen to be there?

A. I was going through to Sandwich to get the steamer H. M. Whitney.

X Q. 185. Who told you to get her?

A. Why, we got a report from Boston that she was due at Sandwich at such a time.

X Q. 186. Who got it?

A. I don't know whether the Pilot's Association got it, or whether the Canal Company got it. It was a telephone from Boston that she had left at such a time.

X Q. 187. Who telephoned you that she had got there and that you were to go through and get her?

A. I was in the office at the time it came in.

X Q. 188. Who told you to go?

A. Nobody,—just merely told me the steamer was coming.

X Q. 189. Who told you?

A. I don't know whether it was the clerk in the tugboat office or whether the clerk in the — or one of the collectors,—there are two or three in the office; I can't say which one of them it was.

X Q. 190. Captain Geer?

A. No, sir,

X Q. 191. Was it one of the Canal Company employees?

A. I couldn't say whether it was one of the Canal Company employees, or one of the tugboat employees; it was one of those in the office.

X Q. 192. What employees of the Towboat Company were there in the office?

A. Bookkeeper. He was in the outer office a part of the time,—over in the canal office.

X Q. 193. Did the same man do the bookkeeping for both companies?

A. No, sir.

X Q. 194. What was he doing over in the Canal Company's office if he belonged in the Towing Company office?

A. I couldn't say. They went back and forth considerably.

217 X Q. 195. Do you know who paid that bookkeeper?

A. The Cape Towing Corporation.

X Q. 196. Do you know that?

A. I know they paid part of his salary.

X Q. 197. How do you know that?

A. Because the Pilot Association paid the other part.

X Q. 198. Do you know who paid it for the Pilot Association, who signed the checks?

A. We had no checks.

X Q. 199. You did not have any bank account, did you, for the Pilot Association?

A. Yes, sir.

X Q. 200. Where was it?

A. Wareham Bank.

X Q. 201. And you signed no checks on the bank?

A. Yes, sir; Captain Geer signed the checks,—Wareham bank.

X Q. 202. And did Captain Geer receipt the bills that were sent out in the name of the Cape Towing Association,—I mean the Pilot Association?

A. No, sir; not as I know of. The bookkeeper receipted those.

X Q. 203. Were you in the association from the beginning?

A. Yes, sir.

X Q. 204. Where was it organized?

A. Buzzard's Bay.

X Q. 205. Who was present?

A. Who was present?

X Q. 206. Yes.

A. Captain Rochester, Captain Bertsche, Captain Geer, Mr. Coakley, Mr. Maass and myself.

X Q. 207. Was there any legal organization formed?

A. There was papers drawn up.

X Q. 208. Was any legal organization ever formed of that association, as far as you know?

A. Well, how do you mean "legal"?

X Q. 209. Anything done under the State law with respect to forming an association?

A. Not so far as I know.

X Q. 210. No association was ever organized, was it?

A. Not in that way; No.

X Q. 211. What?

A. No.

X Q. 212. The reason you got together to do that was because the Canal Company wanted to get out of its liability for your pilots, was it not?

A. I don't know; they made us a good offer, and we accepted it.

218 X Q. 213. And the offer was to guarantee you so much salary, was it not?

A. They guaranteed we would get our salary.

Mr. Pillsbury: I might suggest that this is all in writing, so it is not very profitable.

Mr. Blodgett: Then I will ask to have it produced.

Mr. Pillsbury: Very gladly.

Mr. Blodgett: Something showing the association of these men together as the Pilots' Association.

Mr. Pillsbury: You are talking about a guarantee.

Mr. Blodgett: No, I am not; I am talking about an association. If there is anything in writing I want it produced.

Mr. Pillsbury [to the witness]: Do you know who has got it?

The Witness: I believe the Canal Company has got it; I think Mr. Coakley has it, or Mr. Maass.

Mr. Pillsbury: We will do the best we can to find it if there is such a thing.

Mr. Blodgett: Yes; if there is something, I hope you will.

Mr. Pillsbury: I think there is, Mr. Blodgett; the witness says so, anyway.

The Witness: There was; I won't say there is now.

X Q. 214. After you got together and said there would be an association, you went ahead and piloted and did things just the same down there as you had before in reference to piloting boats, did you not?

A. Well, no; there was some difference.

X Q. 215. What difference?

A. We collected the pilot money instead of the canal.

X Q. 216. They paid it to you?

A. What say?

X Q. 217. They paid it to you?

A. The bills were sent by the Pilot Association.

X Q. 218. Were not all the bills sent out together from the Cape Cod Canal Company?

A. No, sir.

X Q. 219. And were not the checks all sent back to them there at the same address?

A. At the same address, but different names.

X Q. 220. Yes,—one made out to the Cape Cod Canal Company, and another made to the Pilots' Association, and another made to the Cape Towing Company?

A. Yes, sir.

219 X Q. 221. And all sent together in the same envelope to the same office?

A. No, sir.

X Q. 222. All the bills sent out, at any rate, at the same time?

A. No, sir; our bills were sent separate altogether.

X Q. 223. Was your bill sent out separate in this Fay Port case?

A. We have no bill in the Bay Port case.

X Q. 224. Were your bills sent out separately to the White Oak Transportation Company for their boats that had been there before, light?

A. Yes, sir; there was one sent to the Bay State, separately, from the Pilots' Association, I think.

X Q. 225. Are you sure?

A. It was ordered to be sent.

X Q. 226. Are you sure they did not all go together?

A. I didn't see them, but it was ordered to be sent separately.

X Q. 227. Who ordered it to be sent separately?

A. The pilots, three of them.

X Q. 228. Did they all order it to be sent separately.

A. All were there at the time we sent it, telling the bookkeeper to send the bill out for the Bay State,—that we had not received any pilotage for her yet.

X Q. 229. Did you get your orders for taking boats through in the same way after this association was formed as you did before?

A. Why, we were notified before,—we were told how to do it. After the association was formed we were only notified when a boat was coming, and we used our own judgment on taking her through.

X Q. 230. On what,—on the way to handle her?

A. On who should go and that way.

X Q. 231. You did not use your own judgment about the time of taking her through, did you?

A. A good deal of it; yes, sir.

X Q. 232. Could any of you pilots take a boat through until Captain Geer told you to take her through?

A. No, sir.

X Q. 233. Then he retained control for the Canal Company of the time the vessel should be allowed to go through, did he not?

A. Yes, sir.

Mr. Pillsbury: I object to that. That is a conclusion of law.

The Court: The fact that the company controlled the admission of vessels to the canal,—that may go in.

Mr. Blodgett: And I understand the witness to say that they did.

The Court: I understand so.

X Q. 234. There was a signal set at the Wing's Neck side, holding a vessel there or allowing it to go through, was there not?

A. Yes, sir.

X Q. 235. And that signal was only changed on the orders of the superintendent of the Canal Company?

A. The man in charge.

X Q. 236. The man in charge. And he was an employee of the Canal Company?

A. Yes, sir.

X Q. 237. Had nothing to do with the association or the tugboat company?

A. No, sir.

X Q. 238. And on this day when the Bay Port went through on the 13th were you down at Wing's Neck when she started.

A. Yes, sir.

X Q. 239. And the signal was set by the employee of the Canal Company, telling her to go through?

A. I couldn't say; I wasn't paying any attention to that.

X Q. 240. Well, you can say that you wouldn't have taken her through if it had not been set?

A. It must have been set, or they wouldn't have started.

X Q. 241. Yes. And at that time how near high water was it?

A. It was just about high water.

X Q. 242. So that when that signal was set to allow the Bay Port to be taken through you knew that she had got to go through that canal against a head tide, did you not?

A. Yes.

X Q. 243. And of course the Canal Company must have known it?

Mr. Pillsbury: I object to that.

The Court: He does not know that.

Mr. Blodgett: Well, I don't care about it.

X Q. 244. Did you think there was any danger in taking that vessel through, when you were at Wing's Neck?

A. I paid no attention to the vessel at all; I had nothing to do with it.

221 X Q. 245. Did you think there was any danger——

A. No, I did not.

X Q. 246. —in taking that vessel through, when you were at Wing's Neck.

A. I did not.

X Q. 247. Did you know approximately what she drew?

A. I did not.

X Q. 248. Had you seen the pig boats before?

A. Yes, sir.

X Q. 249. You had had experience with them?

A. Light ones.

X Q. 250. Had you had any experience with loaded ones?

A. No, sir.

X Q. 251. Light ones had been through the canal?

A. Yes, sir.

X Q. 252. Now at that time did you know that there were any places in the bottom of the canal where there was less than 25 feet of water at mean low water?

A. I did.

X Q. 253. And how long had you known that,—ever since you had been there?

A. No, sir; I couldn't say how long. I knew that we had one shoal.

X Q. 254. How many months had you known it?

A. I couldn't say that; probably a month or two months.

X Q. 255. Since the June prior to December, was it not,—six months at least?

A. I don't think it was as long as that.

X Q. 256. And did you know that there was a knuckle in the canal?

A. No, sir.

X Q. 257. You never knew of a knuckle in the canal?

A. I knew of a number of knuckles in the canal. I don't know what one you mean.

X Q. 258. How many knuckles did you know of?

The Court: What is a "knuckle"? That I do not understand.

Mr. Blodgett: It is a point of land running out.

X Q. 259. How many knuckles did you know of in the canal between the Buzzard's Bay bridge and the place where this vessel was finally aground on the 14th?

A. Possibly ten or twelve.

X Q. 260. And every one of those knuckles, in the tide, as the tide ran back and forth, would cause a swirl, would it not, of the water?

A. No, sir.

X Q. 261. Did any of them?

A. No, not noticeably.

222 X Q. 262. None of them did noticeably?

A. No, sir.

X Q. 263. Now, did you know of a knuckle between sections 230 and 235?

A. On which side?

X Q. 264. What?

A. Which side?

X Q. 265. On the north side, on the port side going through from Buzzard's Bay.

A. Yes, sir; there is a slight knuckle there.

X Q. 266. And that has existed ever since the canal was built, has it not?

A. Yes, sir.

X Q. 267. It is the remains of where that part of the canal never was taken into the prism, is it not,—always been there?

A. Ever since I have been there.

X Q. 268. Yes. And have you not, in taking boats through, ever noticed that the swirl caused by that knuckle, on certain tides, caused the vessel to handle badly?

A. No, sir.

X Q. 269. You never had any trouble with it at all?

A. Not with that.

X Q. 270. Not with that?

A. No.

X Q. 271. You have with some other knuckles?

A. No, I can't say with "knuckles"; I never heard that expressed that way.

X Q. 272. Did you ever hear Captain Rochester say that he had had trouble with that knuckle that I speak of between 230 and 235?

A. No, sir.

X Q. 273. Did you hear Captain Rochester make any report about this accident?

Mr. Pillsbury: Just a moment.

The Court: No.

Mr. Pillsbury: What he said after the accident?

The Court: No.

X Q. 274. With reference to this knuckle between 230 and 231, where was the shoal spot that you say you knew about?

A. Between 230 and 231?

X Q. 275. You say this knuckle was between 230 and 235 somewhere. Where was the shoal spot that you say you knew about with reference to that,—was it between 235 and 240, along there?

A. It was further than that. I couldn't say the exact location of the section.

223 X Q. 276. It was on the 240 side of it?

A. Yes.

X Q. 277. Nearer Buzzard's Bay?

A. No, it was not; the shoal was to the eastward of 230,—not towards Buzzard's Bay.

X Q. 278. To the eastward of 230?

A. Yes, sir.

X Q. 279. And was there another shoal further up near where she went ashore the second time?

A. There was a shoal about a thousand feet this side of the ferry, to the westward of the ferry.

X Q. 280. Is that where the Salvor was working at that time?

A. That is where the Salvor was working at that time,—not the Salvor, but the Trilby.

X Q. 281. Yes, the Trilby. How long had the Trilby been working there?

A. I couldn't say; she had the middle pretty well off at that time.

X Q. 282. Did you know how shoal the water was in that locality?

A. I did.

X Q. 283. What was the depth of water in that shoal place?

A. I think it was 18 feet or 19 feet, I don't be positive,—something like that; I forget just what it was.

X Q. 284. 18 or 19 feet. Now, I suppose a vessel drawing 18 feet of water could go through safely if there were 25 feet of water, where she could not if there was only 19 feet of water?

A. Yes, sir.

X Q. 285. The effect of that shoal spot, with a vessel going over it, would be to make her unmanageable so she could not handle, would it not?

Mr. Pillsbury: One moment. I think you have got to get the state of the tide in order to get the depth of water.

The Court: I suppose the depth is taken at mean low water.

Mr. Blodgett: Mean low water.

X Q. 286. The tide there raised about how much?

A. Seven feet raise there.

X Q. 287. Seven feet raise. Isn't that quite a good deal?

A. No, that is about normal; six and a half to seven feet.

X Q. 288. About normal. Now, a vessel going over a shoal spot of 18 feet, if the tide was such that she smelled bottom, the effect would be to make her sheer, would it not?

A. Yes, sir.

X Q. 289. And if a vessel going over a shoal spot sheered,
224 it would be difficult to get her—I mean a cargo boat, a cargo carrier—it would be difficult to get her under control again, would it not, when she got over the shoal spot?

A. Unless you made arrangements ahead of time,—prepared for the shoal.

X Q. 290. And if the captain of the boat did not know of that, but supposed that there was 25 feet of water at mean low water at that point instead of there only being 18 or 19, he naturally would not make any preparations ahead of time, would he?

A. He would not.

Mr. Pillsbury: That is objected to.

The Court: No.

X Q. 291. You say you do not know of any shoal spot along about—did you know of any shoal spot about 241?

A. Not at that time, I did not.

X Q. 292. At that time?

A. No, sir.

X Q. 293. As far as you saw, did you see anything out of the ordinary in the steering of this vessel before the first accident?

A. Why, I did not pay much attention only when I heard the bells on the tugboat ring, and I would look out and see she was taking a little sheer.

X Q. 294. And was it anything unexpected to you that she would be taking a little sheer?

A. I thought she ought to go better than that, because I had an idea that those whalebacks would go through the canal very good.

X Q. 295. Would a head tide cause her sheering to increase or decrease?

A. Why, it would make her sheer a little quicker.

X Q. 296. And it would make her sheer a little further, a little harder?

A. Yes, a little harder to break.

X Q. 297. If she had gone through at dead slack, on high water, she would not have sheered nearly so much, would she?

A. No, I don't think she would.

X Q. 298. Who was in the pilot-house of the Dalzelline with you that *that* day?

A. Captain Lecompte.

X Q. 299. And I suppose you and he were watching out ahead?

A. No, sir; I was sitting back in the after room of the pilot-house,
—separate room.

225 X Q. 300. Where was he?

A. At the wheel.

X Q. 301. He was steering?

A. Yes, sir.

X Q. 302. He was the only one in the pilot-house?

A. I can't remember who was in. There was a deckhand that
was in and out.

X Q. 303. But he was steering?

A. He was in charge.

X Q. 304. And in charge?

A. Yes, sir.

X Q. 305. Did you look back when you heard those danger
signals?

A. Yes, sir.

X Q. 306. And you looked back at the same time?

A. I did.

X Q. 307. And all you saw was the vessel sheering to the south
bank?

A. Sheering to the south bank.

X Q. 308. And Captain Lecompte did all he could do to try to
break that sheer?

A. He did.

X Q. 309. And it could not be broken until she struck?

A. Until she struck.

X Q. 310. You did not see anything that the towboat did that
was wrong in reference to the navigation, did you?

A. I did not.

X Q. 311. As far as you could see, Captain Lecompte handled
her all right?

A. He did.

The Court: What do you understand by the words "smelled the
bottom"?

The Witness: I mean that if you get a steamer working, if she is
within two feet of the bottom, they what we call "smell the bot-
tom;" they will commence to settle down and generally will com-
mence to sheer from one side to the other.

The Court: Although there may be two feet of water between
them and the actual bottom?

The Witness: If you are *are* working your wheel strong,—two
feet or more; the harder you work the wheel, the more water they
suck down.

The Court: Isn't that because the vessel settles down and actually
catches on the bottom?

The Witness: She doesn't have to actually catch; if she goes
within six or eight inches of the bottom, she will commence to
sheer around. Of course, the closer she gets, the more she will
sheer.

226 X Q. 312. Captain, after she came off and you jumped on board and went on with her, you gave Captain Hammett every order, did you not, that was given on that boat from that time until she finally landed?

A. I couldn't say whether I did or not; I was the only one there with Captain Hammett,—it was between us two. I couldn't say I gave them orders, or whether we worked together on it.

X Q. 313. Captain Hammett did not give any orders, did he?

A. I wouldn't say whether he did or not.

X Q. 314. As far as you know, did he?

A. I wouldn't say whether he did or not; I don't know whether he did or not.

X Q. 315. You did give him a great many orders?

A. Yes, I did,—not as orders; merely to help the man along.

X Q. 316. Yes, I understand your situation. Her steering gear seemed to work all right?

A. It did.

X Q. 317. There was nothing the matter with that?

A. Nothing any more than she didn't seem to pay any attention to her rudder whatsoever.

X Q. 318. That would be natural, with her head down?

A. It was; yes, sir.

X Q. 319. You don't know how much she drew, I suppose, forward at that time?

A. No,—I know she was way down, her decks was down level with the water.

X Q. 320. She had a lot of water in her?

A. Yes, sir.

X Q. 321. And from the time she came off the second time until she struck finally, she was handled as well as anyone could handle her?

A. Everything was done that was possible to prevent her from hitting.

X Q. 322. And Captain Hammett and his crew did all they could do?

A. Yes, sir.

X Q. 323. You said something about there not being any place to put a siphon pump down. Do you know of any bulk cargo carriers that have openings in the vessel that will allow a siphon pump to go down in the hold?

A. Yes, sir.

X Q. 324. What boats?

227 A. I couldn't say what boats; but there is very few you find that haven't got an extra pump-well to put a siphon down or pump.

X Q. 325. This boat had good pumps, did she not?

A. She had one pump, I believe an 8-inch pump.—I couldn't say the size of it.

X Q. 326. You did not examine it?

A. No, sir.

X Q. 327. You say there are bulk cargo vessels that have extra pump-wells?

A. There are.

X Q. 328. So you can put a wrecking pump down in the well?

A. Not a wrecking pump. You can put a 5-inch suction,—some of them have a place to put a 10-inch suction, but most of them have a 5-inch place anyway.

X Q. 329. Was her pump working all the time at this time?

A. It was.

X Q. 330. And it was drawing water all right?

A. Very good.

X Q. 331. Now, captain, if the tide had been high on this second occasion, or there had been water enough under her for her to handle, she would have gone through all right on the second time, would she not?

A. I don't think so.

X Q. 332. What do you think would have happened?

A. I don't think the canal was wide enough, in the shape she was in, to get her through. We had 30 feet of water or 40 feet under her when she struck.

X Q. 333. You had just been over a shoal spot that you knew before?

A. Pretty near 2,000 feet clear of the shoal spot.

X Q. 334. And on that shoal spot did she begin to act badly?

A. No, sir; we straightened her up on the shoal spot,—she acted badly, yes, before we got to it; but when we got on the shoal spot, we straightened her up and steadied her up again.

X Q. 335. Do you think she touched bottom there?

A. No, sir, she did not.

X Q. 336. She smelled the bottom pretty badly?

A. I don't think so, because she was drifting.

X Q. 337. Wouldn't she smell bottom?

A. Drifting?

X Q. 338. Yes.

A. No, sir, she would not.

X Q. 339. She would not? Why is that,—because she
228 swirls when the propeller is going?

A. The propeller is going and pulls her down a good deal.

X Q. 340. How much does the propeller pull her down?

A. That is according to the depth of water. In the deep water it won't have as much effect as in shoal water.

X Q. 341. Over this shoal place, working the propeller would pull her down still more?

A. Yes, sir.

X Q. 342. And if the vessel is running at a four or five knot speed, how much do you think it would pull her down?

A. Well, if the engines were working easy, you wouldn't hardly notice it.

X Q. 343. But if they are running four or five knots?

A. Some boats may run four or five knots with their engines just turning over.

Mr. Blodgett: That is all.

Redirect examination.

(By Mr. Pillsbury:)

Q. 344. Mr. Blodgett asked you about the shoal spots. You have described, in direct examination, where the vessel began to sheer; that is, as I recall it, about at the railroad bridge, and then again a little beyond the Bourne bridge. Were there any shoals at either of those spots?

A. There was not.

Q. 345. How much water was there at those spots?

A. Twenty-five feet at low water.

Q. 346. Now, was there any shoal at the point that she went aground the first time or just before the point that she went aground?

A. Not to my knowledge.

Q. 347. Where was the nearest shoal to the point that she went aground?

A. It was three or four thousand feet to the eastward.

Q. 348. Well, now, do you recall how the boat acted in going over that point?

A. The boat was steering very bad just as we came to that point; the Trilby was working on that point at that time.

Q. 349. Then I will ask you whether the boat began to sheer before she got to this shoal where the Trilby was working?

A. She did.

Q. 350. Where she began to sheer that time, how much water was there?

A. Forty or fifty feet.

Q. 351. When you were going over this shoal, tell us
229 whether you had any further difficulty with the boat.

A. We straightened the boat up on that shoal or at about that shoal; and going by the ferry, about a thousand feet the other side, she started to sheer to the southward just a little.

Q. 352. Now, you straightened her up on this shoal where the Trilby was working, you said?

A. We did.

Q. 353. Was that the shoal where it was the shoalest,—where there was 18 feet, which Mr. Blodgett has referred to?

A. That is the place; yes.

Q. 354. Now, at the state of the tide that existed at this time, how much water would there be, even on that most shoal 18-foot depth, under the boat?

A. About 22 feet.

Q. 355. She drew 18 feet, 2. That would be substantially three feet of water under her at this shoalest spot,—is that right?

A. I should think so; yes.

Q. 356. With three feet of water under her, would you expect that she would smell the ground?

A. Not drifting.

Q. 357. Would you expect that she would smell the ground with the engines running as they were on this occasion?

A. The engines was at a standstill, I think, going over that shoal, when she drifted over it,—I won't be positive,—but they were only working the engines just to break the sheer on the boat.

Q. 358. You are speaking of after she struck the first time?

A. Yes.

Q. 359. So that they were not working at all at that time?

A. Practically not.

Q. 360. Now, coming back to the time that she struck the first time, what was the nearest shoal to the point that she struck on the first day?

Mr. Blodgett: He said he didn't know of any.

A. I don't know of any shoal that she had passed over up until she struck.

Q. 361. You do not know of any shoal place whatever?

A. No, sir.

Q. 362. From the time that she entered the canal until she struck?

A. No, sir.

230 Recross-examination.

(By Mr. Blodgett:)

X Q. 363. Is Captain Rochester at the canal now?

A. He is.

X Q. 364. He is the one who was on this boat at the time of the first accident?

A. He was; yes.

(By Mr. Park:)

X Q. 365. Captain, when the efforts were made by the tugboats on the afternoon of December 13th to relieve her from her stranded position, where were you?

A. On the tug Stuart.

X Q. 366. Were you on the Bay Port at all?

A. Not that day; I don't think I went aboard the Bay Port at all.

X Q. 367. Did you give any orders from the Bay Port that day as to what the tugs should do in their attempt to pull her off?

A. I say I was not on board the Bay Port.—I won't be positive of that; I don't know but what I did go aboard the Bay Port.

X Q. 368. Did you give any orders from the Bay Port?

A. Only passed the orders from Captain Geer on the link to the tugboat.

X Q. 369. Do you say no efforts were made by the tugs to pull her off until such orders were given by Captain Geer?

A. The tug Dalzelline tried it before Captain Geer got there, and she couldn't pull her off; but Captain Geer was there as soon as the other tugs got there.

X Q. 370. Now, captain, in this report which has been handed us by your counsel, signed by you, the statement made before Com-

modore Miller, I find this statement: "I gave orders to the tug Stuart to pull the Salvor out of the way and to the tug Dalzelline to come alongside as soon as possible." Is that correct,—did you give those orders?

A. I probably did, but I don't remember just what orders were given. It was all giving orders.

X Q. 371. Who were the managers and the officers of this Pilots' Association?

A. Captain Geer was the manager elected by the pilots.

X Q. 372. Any compensation for that office?

A. No, sir.

X Q. 373. Was he notified by any writing that he was
231 elected manager of the Pilots' Association?

A. He was there present at the meeting and was elected.

X Q. 374. I understand you did not form any corporation or association under any statute authorizing you to form it; but it was a mere voluntary association of so many pilots, where you agreed to pool your issues and pool your claims and have Captain Geer collect them for you?

A. No, sir; we done our own collecting, excepting it was mailed voluntarily in.

X Q. 375. But you had no officers?

A. A bookkeeper.

X Q. 376. You had a bookkeeper?

A. Yes, sir.

X Q. 377. And what was his salary?

A. What say?

X Q. 378. How much did you pay him for his salary?

A. \$15 a week, I think his salary was, or \$18 a week. The Cape Corporation paid half, and the Pilots paid half.

X Q. 379. Who paid half, did you say?

A. The Pilots and the Cape Towing Corporation.

X Q. 380. The tugboats paid half?

A. I think it was half; we divided it up between us.

Redirect examination.

(By Mr. Pillsbury:)

Q. 381. Were you in the employ of the Canal Company at the time of this accident?

A. No, sir,

Q. 382. And you had not been in their employ for how long?

A. I had not been in their employ since the 4th of September,—I think it was the fourth day of September we—the first day of September practically we started the Pilot Association.

Q. 383. Now, there was one thing I forgot. In your cross-examination you said, in reply to Mr. Blodgett's question in relation to knuckles, which I think he defined as a point of land sticking out into the canal, that there might be ten or a dozen of them. Have you ever heard of this word "knuckle" until this case was coming on for trial?

A. Not until recently; no.

Q. 384. Was there every any talk at the canal about any knuckle at this point or anywhere else?

A. I never heard it expressed that way.

Q. 385. Now, take the so-called "knuckle" at the point that Mr. Blodgett indicated. How much of a sticking out of a point
232 of land was it; how much did it stick into the canal, if it stuck at all?

A. On the surface it might project out 4 feet or 5 feet on the top; but at the bottom of the slope it is really not out at all, if any, as far as the natural slope of the canal is, because it is straighter up and down than the natural slope.

Q. 386. There is no projection into the prism of the canal?

A. Not at all.

Q. 387. It is a mere inequality of the bank at the top of the slope?

A. Yes.

Q. 388. And you say there are many other inequalities all up and down there?

A. There is.

Q. 389. How many ships have you yourself piloted through the canal before this accident?

A. I couldn't say how many; every night from the 22d of May until the 4th of October I was on,—every night and part of the days.

Q. 390. Have you ever had any of those ships at any stage of the tide smell the bottom at any of these shoal spots?

A. I had a ship once, at one time, the James Whitney, drawing 20 feet of water smell the bottom at this ferry place, but I was told about the shoal, and we went over it all right.

Q. 391. She drew 20 feet?

A. Yes, sir.

Q. 392. What was the state of the tide at that time?

A. Very near low water.

Q. 393. With that exception, have you ever had it?

A. I had a Government ship once that, at the Sagamore bridge smelled the bottom; we had a shoal there at that time.

Q. 394. What was the depth there?

A. I think it was about 20 feet.

Q. 395. And what was the tide?

A. Head tide.

Q. 396. And what was the draft of the ship?

A. Nineteen feet.

Q. 397. Then I will put it in this way: Would you expect that a vessel drawing 18 feet, 2 inches, with the tide at the point that it was on the first day that the vessel was going through, namely, I take it, about half tide, would smell bottom even on the most shoal place that you have described?

233 A. Not that far through the canal, because we have such a raise and fall of the tide that half tide would make quite a lot of water over that shoal.

Mr. Pillsbury: That is all. Did you intend to put that statement in, Mr. Park?

Mr. Park: No, that was all I wanted, just that one thing that I asked him about.

Mr. Pillsbury: I will ask to have that marked for identification, the statement of Captain Lewis, called for by Mr. Park.

[The statement is marked, by the clerk, for identification.]

THOMAS LECOMPTE (sworn).

(By Mr. Pillsbury:)

Q. 1. Your full name, please, captain?

A. Thomas Lecompte.

Q. 2. Where do you live, captain?

A. I live at 20th Avenue, Brooklyn.

Q. 3. What is your occupation?

A. Well, captain of tugboats and steam lighters.

Q. 4. How long have you been captain of tugboats?

A. And steam lighters, about 19 or 20 years.

Q. 5. On the 13th of December, 1916, were you captain of one of the tugboats at the canal?

A. Yes, sir.

Q. 6. You heard Captain Lewis testify,—you have been here while he has testified?

A. Yes, sir.

Q. 7. You had the Dalzelline?

A. I had her.

Q. 8. Well, now, will you tell us in your own way what you first had to do with the Bay Port, where she was and what happened?

A. Well, she was laying at Wing's Neck, anchored, and I had taken pilot Rochester down there to go aboard of her. That was about noontime, I think, that day. And I told the captain,—I asked him how much water she was drawing, I think the best I can remember now,—I or Rochester, one or the other; and I think he said 18 feet. "Well", I says, "get your anchor, we are going through with you." And I asked Captain Rochester how much hawser he wanted; and he said: "Give him a pretty good hawser", he says; "I will let you know,—go ahead and I will let you know how much hawser,—I will shout to you." So he done so. But

234 before he got aboard we made an agreement that if he wanted me to work her stronger, he would blow four or five strong whistles; and if he wanted her to go slow, he was to blow two or three whistles, and we were to go on easy. So after we got the anchor, she came along all right. I had a man in the pilot-house with me part of the time, and he was out on deck part of the time; and I told him to keep a good watch on her. And we went through Buzzard's Bay railroad bridge and Bourne bridge nicely, I thought; and all at once this mate of mine, he hollered out,—he says: "My God, that ship is trying to turn around", and four or five danger whistles were blown, and that meant for me to hook her up; and I hooked her up, and I looked around, and she was going for the

south bank, but we straightened her enough so she laid parallel with the canal; but she fetched up, and I couldn't pull her off.

Q. 9. You were not facing the boat until you heard these whistles; that is, you did not look at the Bay Port until you heard these whistles?

A. No. The mate seen him and hollered to me, and he said: "By God, she is about to turn around." And the mate,—as I hooked her up, he was looking back all the time; one of us was watching her all the time going through.

Q. 10. When you looked back, what was she doing; was she trying to turn around?

A. Well, she had a bad sheer on her, going for the south bank.

Q. 11. Now, you were with the Bay Port for some time after she struck?

A. Yes.

Q. 12. How late did you stay there that day?

A. Until about 6,—6.40, I think, when we changed crews,—6.30 or 6.40.

Q. 13. Had Captain Joseph Lewis arrived then?

A. I don't think he had. I think I saw Captain Lewis that night about 8 o'clock in the office at Buzzard's Bay. I am not positive of it, but I think it was about 8 o'clock when he arrived there,—8 or 9 o'clock.

Q. 14. You saw him the next morning?

A. Oh, yes, I seen him the next morning.

Q. 15. What did you see him do the next morning?

A. Captain Joe?

Q. 16. Yes.

A. Oh, he was down there and around the ship. He gave
235 me orders to go to Buzzard's Bay and get some blocks off from a lighter they had there. I think I made a couple of trips there; I think I took him up there once from Buzzard's Bay. I remember I got the blocks, you know, and brought them down there, and we talked a little together; I disremember now what it was passed.

Q. 17. Was he directing the work going on there?

A. Yes, he did—he was directing the work.

Mr. Blodgett: I object. Let him state what he saw.

Mr. Pillsbury: Strike that out.

Q. 18. What did you see him do in relation to the work going on there?

A. Captain Joe Lewis?

Q. 19. Yes.

A. He had some men—I think he asked Captain Geer for some men from the office to help him get coal out. Geer told him he would give him all the men he had around there. And he wanted to get some coal, and he commenced to put some coal on the derrick on a lighter there. I didn't pay much attention to it, because I was going backward and forward; he was using me as a handy boat, backward and forward.

Q. 20. Did he give you instructions?

A. Captain Lewis did, yes.

Q. 21. Now, what did you observe being done in relation to getting water out of the ship, if anything?

A. We tried to get water out of the ship. The captain of the ship told me he hadn't any way of getting a siphon in her.

Q. 22. You mean the day she sank?

A. Yes. Well, Captain Geer was—he came down on the bank, you know—

Q. 23. No; I am not referring to the day she sank, I am referring to the first day.

A. Well, I mean the first day, when she sunk—when she struck on the bank. Captain Geer hollered across to me to get a siphon in her, and we spoke to the captain of the ship about it, and he said he had no way to get a siphon down. I hollered to Captain Geer—I told him we had no way to get a siphon into her.

Q. 24. What was done?

A. There was nothing done. I guess she was running her
236 own siphon that she had—I don't know whether it was a pump or siphon she had. She was running her own pump.

Q. 25. Well, now, will you describe what took place the next day?

A. She floated off the next morning.

Q. 26. At what time?

A. Around—if I remember right, I think it was 10.10.

Q. 27. Where was Joseph Lewis when that happened?

A. That is hard for me to say, when she floated off, because I was laying ahead of the ship, with a line on this lighter, or on this Hazleton, one or the other, I disremember which one; I think it was on the lighter I had a line, laying there.

Q. 28. He was in the vicinity there?

A. Oh, yes, Joe Lewis was around there; he was on the ship or on the lighter, one or the other. He was around there.

Q. 29. How were your tugs placed at the time she went off?

A. Why, the Dalzelline was lying right up ahead, a little on the port bow—I think her bow was laying on the port bow of the ship; and, if anything, I think the Hazleton's bow was on the starboard bow of the ship, but I wouldn't be positive of it. And the Stuart was laying alongside of the lighter, laying about amidships of the ship.

The Court: Your tug was the Stuart?

The Witness: Mine was the Dalzelline.

The Court: The Dalzelline?

The Witness: Yes, sir.

Q. 30. Facing which way?

A. Facing to the westward.

Q. 31. Were your engines running?

A. No, sir.

Q. 32. Had Captain Joseph Lewis given you tug captains any orders the night before that you know of?

A. Well, Captain Geer told us—I think it was about 8 o'clock that night—told us—all the captains there—he told Captain Joseph Lewis: "There is three boats, you do as you please—go on and handle them boats as you can—do as you please with them, I will give you all the help you want."

Q. 33. This was something Geer said to Joseph Lewis?

A. Yes, sir.

237 Q. 34. What orders, if any, did Joseph Lewis give that night?

A. Give that night?

Q. 35. Yes—in relation to what your tugs should do?

A. Well, I don't know. He gave orders for the boats to lay there by her to hold her on the bank.

Q. 36. He told you to hold her on the bank?

A. Yes; but I went off watch, you know, about 6.30 or 6.40. About that time we had orders to stay there and lay by.

Q. 37. What orders the next morning did he give to the tugboats about holding her on the bank or otherwise?

A. He didn't give me any orders at all, because I was running back and forwards, doing his errands for him.

Q. 38. As a matter of fact, the tugs were not holding her against the bank the next morning?

A. I was not, no; and the Hazleton was not, I don't think. The Stuart might have been working ahead; I am not sure about that.

Q. 39. At the time she went off, they were not holding her against the bank?

A. No.

Q. 40. Were her engines running when she went off, when she floated?

A. What—the ships?

Q. 41. Yes.

A. Not when she floated; no.

Q. 42. Do you know where her captain was when she floated?

A. He was down on deck there.

Q. 43. Now describe just what happened from the time she floated up to the time she hit again.

A. Why, I got orders to turn around and get a hawser on her.

Q. 44. From whom?

A. I think it was Captain Bill Lewis, but I wouldn't say. It was some man called from the ship; I don't know whether it was the captain of the ship or Bill Lewis.

Q. 45. Somebody called to you from the ship?

A. Yes, and the word was transferred from the Hazelton; the captain of the Hazelton spoke to me—he hollered to me; he didn't think I heard him, but I heard him, and I turned around and got a hawser on.

Q. 46. Go ahead. What did the other tugs do, if anything?

238 A. Well, the other one—the Stuart had taken the lighter. And I left the lighter and Stuart there, and the Hazelton. We got her out of the way after a while, and I got a hawser on her. But the Hazelton went astern of the ship—passed the

ship on her starboard side; and I didn't see anything of her any more until we got down to the ferry, just past the ferry, and then I saw her come up on the port side of the ship. That is about the time she was going on to the bank.

Q. 47. How far did the Bay Port go before she went on to the bank?

A. I should say half a mile or three-quarters of a mile—I guess all of that.

Q. 48. During that time was she under control?

A. Pretty bad control.

Q. 49. Describe her course, what she did, how she acted.

A. Why, she was going from one side to the other; only once in a while you would see her—probably two or three lengths she would go steady, and then take a further dive from one side to the other—she didn't like the water, and she was trying to roll over if you gave her too much wheel; she would roll and dive.

Q. 50. That was true all the way until she struck?

A. Until she struck.

Q. 51. When did you see the captain after the boat went off to have a talk with him or see him do anything?

A. The captain of the ship?

Q. 52. Yes, Captain Hammett.

A. I didn't have but very few words with the captain at all.

Q. 53. Was that after she struck?

A. After she struck, the first day, or the next day either. I spoke to him, but I don't think I changed half a dozen words with him.

Q. 54. Do you remember what that was?

A. No, sir, I do not. I don't think I had half a dozen words, and I don't know what that was. I might have said it was too bad, or something like that.

Q. 55. What?

A. I might have said it was too bad—I might have said it was too bad, or something like that. But we didn't—further than that we didn't pass any conversation about it at all.

Q. 56. Did the captain at any time say to you anything in relation to whether the ship was a good handling ship or otherwise?

239 A. The captain did not; no, sir; he never said nothing to me about it.

Q. 57. Did anybody?

A. Why, the mate, after she struck—

Mr. Blodgett: I object to what the mate said.

Q. 58. Was the captain present at the time the mate made this statement?

A. No, sir.

[Adjourned to 10.30 a. m., Wednesday, March 20, 1918.]

Boston, Mass., March 20, 1918.

(By Mr. Pillsbury:)

Q. 59. Captain, I think at the close yesterday I was asking you about a conversation or statement made by the mate of the Bay Port

to you. I had not asked you the exact point of time and what the conditions were at the time he made this statement. Will you tell us when it was? Do not tell us what he said, but tell us, first when it was that he said anything to you in relation to the accident.

A. What,—the mate of the ship?

Q. 60. Yes.

A. Why, he was in a yawl boat; and he came alongside and got out and left his yawl boat adrift; and he told me——

Q. 61. Just a minute before you say what he told you. That is, he was in a yawl boat of the ship Bay Port?

A. Of the ship that was sunk; yes.

Q. 62. That was on the 14th after she had struck the second time?

A. The 14th; yes.

The Court: This is Hammett?

Mr. Pillsbury: This is the mate. Hammett was the captain. This is the mate.

The Court: Yes.

Q. 63. He had left the ship in the ship's boat and was floating in the boat,—is that it?

A. He was in the boat, yes; and he came alongside of me.

Q. 64. How soon after the ship struck was this statement made?

A. Well, she had struck and backed off and sunk.

Q. 65. How soon after the time that she struck was the statement made to you?

A. I know I had stopped and got my hawser; and when we was laying there in the canal, and when he came aboard my boat
240 he drifted down in a yawl boat and let go his boat; and then he asked me to go and get his boat for him.

Q. 66. That is, he had got off the steamer into the small boat?

A. Yes.

Q. 67. And you picked him up out of the small boat?

A. He got out of the small boat on to me first, and let his boat go adrift.

Q. 68. How long a time had elapsed between that and the time she struck; how many minutes, do you think?

A. I couldn't say that; I know she struck, and she settled after she struck,—backed off on the other side.

Q. 69. How many minutes? Ten minutes or so?

A. Five or ten minutes; yes.

Q. 70. Five or ten minutes. And he asked you to pick up his boat for him?

A. He asked me to get his boat, or somebody asked me. So I rounded to and went down and got it.

Q. 71. Was that the time he made this statement?

A. What statement is that?

Q. 72. Any statement about the accident to you?

A. Oh, he said——

Q. 73. I do not ask you what he said, captain,—but that is the time he said whatever he did say, is it?

A. Why, I heard him say they ought to get away,—get off from that ship, the boiler might blow up.

Q. 74. Well, that is one thing that he said. Now, did he say something else in relation to the accident at that time?

A. He said—

Q. 75. Not what he said, but did he say anything?

A. He told me that he told the captain not to come through there.

Mr. Blodgett: I object.

Q. 76. No,—pay attention to the question.

A. That is what he said.

Q. 77. I am trying merely to find out if he said anything at that time about the accident in addition to the fact that they ought to get off for fear the boiler would blow up,—did he say anything more than that? Not what he said, but did he say anything?

241 A. That is all he said to me; he said they ought to get off the ship, the boiler might blow up.

Q. 78. Well, did he say anything more in relation to the accident, as to any talk that he had had with the captain?

A. Only her steering abilities,—that is all I heard.

Q. 79. Well, that is it. Now—

A. He might have said more, but I disremember now.

Q. 80. Did he say anything about her steering abilities at this same time when you took him out of his boat?

A. He said she steered badly.

Q. 81. Not what he said. Did he say anything at the time? I am trying to fix the time of that statement now,—not what he said. I will ask you that in a minute.

A. The time?

Q. 82. Yes.

A. Well, that was the time I picked him up, and he got on the boat.

Mr. Pillsbury: Now, if your Honor please, I want to offer what he said, as a part of the *res gestæ*.

The Court: Is that objected to?

Mr. Blodgett: It does not seem to me it is admissible. The mate will be here and he can cross-examine him when he is on the stand, and the captain will be here.

The Court: I have no doubt about it. If it is objected to, it is not admissible. It is excluded.

Mr. Park: Only the declarations of the captain are admissible.

Mr. Pillsbury: I should not offer it except as part of the *res gestæ*.

The Court: It is not part of the *res gestæ*, clearly.

Mr. Pillsbury: The mate will be here, will he?

Mr. Blodgett: They are both here.

Q. 83. Now, captain, will you tell us whether or not you had any conversation with Captain Joe Lewis during the morning of the 14th, before the ship floated, as to whether or not it was a good time to take her off?

A. Well, I believe Captain Joe—we were talking about it when I

landed them blocks, and I told him I thought it was a pretty strong tide to go through with her.

242 Q. 84. About what time was that?

A. That was about quarter of ten; probably half-past nine or ten o'clock.

Q. 85. That was about half an hour before she floated?

A. Yes.

Q. 86. And what reply did he make to that?

A. Why, he says: "We have got three powerful tugboats." He says: "Tom"—that is what he called me—he said: "Tom, we will hold her", he said;—"they will hold her."

Q. 87. What orders during the day of the 14th or the night before did you hear Joseph Lewis give?

A. He didn't give me any orders, only the next morning, on the 14th about going and getting blocks.

Q. 88. On the 14th he ordered you to do that?

A. To go to Buzzard's Bay and get some blocks off a lighter he had there.

Q. 89. Did he give you any orders that morning as to how you should place your tugs?

A. No, sir.

Q. 90. And, as a matter of fact, when she floated your tugs were headed to the westward?

A. Headed to the westward; yes, sir.

Q. 91. With your engines not running?

A. Not running.

Q. 92. Now, will you describe the condition of the ship as you observed it after she came off on the 14th, as to her trim?

A. Well, she was listed a little to port, and a little by the head.

Q. 93. Down at the head?

A. Some,—down at the head some, yes.

Q. 94. Will you describe how she acted from the time she came off up to the time that she struck?

A. Well, she run a little ways along very nicely,—probably she went very nearly a mile or three-quarters of a mile before we sunk her again.

Q. 95. Keep your voice up.

A. She commenced swinging, you know, backward and forward; she would take sheers, you know. We had a short hawser, and we held her straight two or three times before she did land.

Q. 96. And finally she landed?

A. She landed; yes.

Q. 97. Landed as you have described already?

A. Yes, sir.

Q. 98. Was anything done the night before she went off to keep her against the bank?

A. They had some tugboats. I went off watch about half-past 6. They had tugboats there.

243 Q. 99. There was nothing done while you were there?

A. No; only I left the tugboats laying there.

Q. 100. The next morning was anything done to either keep her

against the bank or secure her to the bank; or secure her so if she should float she would be under control?

A. Well, the Stuart was laying alongside of her outside of the lighter; but the Hazelton and the Dalzelline was laying head to her, hanging on to one line.

Q. 101. They were heading to the westward?

A. They were heading to the westward, and the ship was heading to the eastward.

Q. 102. Was any hawser attached to the bank in any way?

A. I don't think so.

Q. 103. Now, referring to your conversation with Captain Lewis as to—

The Court: Let me see if I get the exact situation here. I was under a misapprehension as to the way in which the vessels were heading. The Bay Port on the night of the 13th was headed east towards Buzzard's Bay?

The Witness: No, towards Sandwich.

The Court: Quite right,—towards Sandwich?

The Witness: Yes.

The Court: I was right, then. I carried my points of compass wrong.

The Witness: Yes.

The Court: Yes, that is right.

Q. 104. Referring to the conversation that you testified to with Joseph Lewis about the state of the tide on the morning of the 14th, what was the state of the tide when you had that talk with him?

A. I disremember now. Probably the tide had been running up three or four hours, but I disremember now; I couldn't say.

Q. 105. And it was running to the eastward?

A. Running to the eastward; yes.

Q. 106. Was that, in your opinion, a favorable time to take her to the eastward, with a favoring tide, or should she be taken against the tide?

A. She sunk the day before against the tide; but, of course, we had more tugboats the next day.

244 Q. 107. You told him you did not think that it was a right tide to take her through on?

A. I told him I thought it was a pretty strong tide running,—that is the remark I made.

Q. 108. What tide should you say was the best?

A. Why, slack water is the best of any tide to go through that canal.

Q. 109. When you had that talk with him did he say anything as to when he expected to take her off?

The Court: On the morning of the 14th she was not tied to the bank at all?

The Witness: I don't think so.

Mr. Blodgett: Perhaps your Honor would like to see that photograph. This photograph shows her headed this way [passing a photograph to the Court].

[The question is read as follows:]

"When you had that talk with him did he say anything as to when he expected to take her off?"

A. No, he did not.

Q. 110. Now, at the time she floated, how much coal, in your judgment, had been taken out of her?

A. That, I don't know. I let go from there after I was talking with him and went around to the bow and hung on to one line, and I couldn't see.

Q. 111. Had they taken out a little coal?

A. They had a little pile of coal when I was laying alongside of her after landing the blocks.

Q. 112. They had been pumping water out of her with their pump?

A. A siphon it looked to me like, on the port side. I see a siphon running, or pump of some kind.

Q. 113. They had been pumping water out of here with a siphon or pump that morning?

A. With their own pump on the ship; yes.

Q. 114. Captain, referring again to this conversation with Joseph Lewis, did he not say to you when you asked him about this condition of the tide——

Mr. Park: I object to the form of the question as leading.

Mr. Pillsbury: I will ask a preliminary question.

245 Q. 115. Have you exhausted your memory as to the conversation with Joseph Lewis; have you told us all that you remember?

A. That is about all I can remember.

Q. 116. Now, I will ask you if he did not tell you, in reply to your suggestion that you testify to, to mind your own business, that he knew what he was doing?

A. No, sir, he did not.

Q. 117. Have you made a statement to that effect, captain?

A. No, sir; he did not tell me to mind my own business. Joe Lewis never told me that in his life.

Mr. Pillsbury: That is all, captain.

Cross-examination.

(By Mr. Park:)

X Q. 118. You say a siphon, captain, was used on the Bay Port?

A. Siphon or pump of some kind. I saw a stream of water.

X Q. 119. It was the Bay's Port's pump or siphon?

A. Yes, the Bay Port's pump.

X Q. 120. Captain, I understand the only real orders you got from Captain Joseph Lewis were to go down to Buzzard's Bay and get some blocks, and you went down and got them?

A. Got them for him.

X Q. 121. When the ship came off your boat was upon the port bow of the Bay Port?

A. Yes, sir.

X Q. 122. He did not give you orders to go on the port bow of the Bay Port or how you should tie up at all?

A. No, sir.

X Q. 123. You did that of your own accord?

A. We were laying, so many of us abreast, there in the canal, and the captain of the Stuart told me he didn't want me to lay there, because it would break him loose, so I got down astern of him on the end of the Bay Port.

X Q. 124. You did not get any orders from Captain Joseph Lewis as to how you should lie alongside of the Bay Port?

A. No, sir.

X Q. 125. You were in that position on the port bow of the Bay Port when she came off?

A. Yes, sir.

X Q. 126. And then I understand you to say that somebody on the Bay Port,—and you thought it was pilot Lewis,—told you to take a line from the bow of the boat?

A. Yes, sir.

246 X Q. 127. And you did take a line from the bow and went on?

A. I did.

X Q. 128. Practically, that is all you know about this case as far as Captain Joseph Lewis' relations to it are concerned,—what you have testified to?

A. Yes, as far as Captain Joe was concerned, that was all there was,—that is all the conversation we had.

X Q. 129. Did your boat, the Dalzelline, try to pull her off of the bank where she was stranded on the afternoon of the 13th?

A. Yes.

X Q. 130. And did all of the three boats try to get her off?

A. Yes, sir; after they got there.

X Q. 131. At that time no examination had been made of her starboard side under water by any diver, had there?

A. Not at that time.

X Q. 132. She was making water; you knew that?

A. Yes.

X Q. 133. And it was your intention, and it was your orders, was it not, to take her off if you could and get her out of the canal,—take her to the eastward?

A. Yes, sir.

X Q. 134. You tried to do it?

A. I tried to do it.

X Q. 135. You couldn't do it?

A. No, sir.

Mr. Park: That is all.

(By Mr. Blodgett:)

X Q. 136. Who gave you orders on the afternoon before to pull on her and take her out of the canal?

A. On the afternoon after she struck?

X Q. 137. After she struck; was it Captain Geer?

A. No; Captain Rochester and I, you know,—he hollered to me to shorten up my hawser a little and give him another pull; I pulled on her before I shortened the hawser; then I shortened the hawser and pulled and couldn't get her off; and then I commenced blowing for the other boats to give me a hand, because the tide was falling, and I found out I couldn't do it, and got back alongside of her.

X Q. 138. Did Captain Geer come down there?

A. He came down after I got back alongside of her.

X Q. 139. Did you and the other boats pull on her after he got down?

A. Well, I disremember now whether we were pulling then or not; when he got there he told me to get a siphon in her.

247 X Q. 140. And he took charge when he came there?

A. He was the other side of the canal, on the bank.

X Q. 141. And he took charge of the operations when he came there?

A. There was nothing to take charge of; she was laying there, and we couldn't get her off; she had charge of herself.

X Q. 142. Well, now, captain, on the day before, when towing up through before the accident, she went along and steered perfectly all right so far as you saw?

A. Yes, sir.

X Q. 143. Until you heard three whistles or something like that?

A. Heard four or five whistles.

X Q. 144. Yes, and look back?

A. Yes.

X Q. 145. And at that time she was sheering towards the south bank?

A. My hawser was slack, and she was sheering to the south bank.

X Q. 146. You did all you could to try to break that sheer?

A. I hooked her up at the time I heard the whistles; and when I looked at the hawser it was slack.

X Q. 147. About what place was it where you noticed her sheering? Do you know it by the numbers?

A. No, I don't know the numbers.

X Q. 148. You do not know it by the numbers?

A. I don't know it by the numbers, but it was about three or four lengths from where she was sheering before she sunk.

X Q. 149. From where she struck on the rock?

A. Yes.

X Q. 150. About three or four lengths to the westward?

A. Yes.

X Q. 151. Toward Buzzard's Bay?

A. Yes, sir.

X Q. 152. Had you ever known there was a shoal spot there?

A. Well, people had told me, but I had never struck it,—that there was one somewhere along there,—I don't know exactly where.

X Q. 153. Had you examined the blueprints in the company's office to see the condition of the bottom along there?

A. Well, yes, some of it.

X Q. 154. And had Captain Geer or Commodore Miller told you that they knew that there was only about 18 or 19 feet of water along there?

A. I disremember along there. They had down to Sagamore bridge, they told me, about 18 feet or 19 feet of water
248 down along there; and I disremember whether they ever told me along there or not.

X Q. 155. Will you say they did not tell you?

A. I wouldn't swear to it; no.

X Q. 156. But you did know, from your examination in the Canal Company's office of plans that the Canal Company has, that there was a shoal spot along there where she hit?

A. Along there somewhere; yes.

X Q. 157. And that shoal spot was about where you first noticed her sheering?

A. When she blew that whistle it was the first time I noticed her sheering.

X Q. 158. And that was near the shoal spot which was shown on these plans, was it not?

A. Somewheres along there; yes.

X Q. 159. Yes. And I suppose that you knew what the draft of the vessel was?

A. I asked the captain when I got there, the best I can remember, out at Wing's Neck,—Captain Rochester or me asked him, and I think he said 18 feet,—I am not sure.

X Q. 160. Did he not say "18 feet, 2 or 3"?

A. I disremember; I think he said 18 feet; I am not positive; I know it was around 18.

X Q. 161. Around 18?

A. Yes.

X Q. 162. It was 18 something?

A. Yes.

X Q. 163. And she was by the stern at that time?

A. Well, I never loaded any one of those pigs in my life; I don't know how they look; they are short at both ends, anyhow.

X Q. 164. Did you ask him what she drew forward?

A. No; but I should suppose they draw a little more aft than forward; they always do.

X Q. 165. That is the proper way to trim her?

A. Yes, sir.

X Q. 166. And you supposed she was trimmed properly?

A. Yes.

X Q. 167. And as you went through, you did not have any difficulty at all?

A. No trouble at all until we got up to there.

X Q. 168. I suppose that Captain Geer or the Canal Company told you when to go through?

A. He didn't tell me.

249 X Q. 169. He had the signal set for you to go through?

A. The signal was a white flag at Wing's Neck to go through.

X Q. 170. And that was set by the Canal Company?

A. Yes, sir.

X Q. 171. And therefore you took her through in the best way you could,—you and Rochester?

A. And Rochester; yes.

X Q. 172. The two of you,—one on the tugboat and one on the boat?

A. He told me when we went out there,—he said, "If I want you to go faster I will blow four or five whistles," and if he wanted me to go slow, he would blow two whistles.

X Q. 173. Under the conditions that existed at the time the white flag was set to take her through, you took her through in the best way you could?

A. Yes, sir.

X Q. 174. And you did not see anything he did that was wrong?

A. No, sir.

X Q. 175. And, of course, you did not see anything that you yourself, the tugboat, did that was wrong?

A. No, sir; we done all we could. She went along nicely to that place.

X Q. 176. Did you know of the existence of a knuckle up there?

A. Knuckle.

X Q. 177. Yes, about where she went ashore?

A. What do you mean by "knuckle," a shoal that makes up, forms up a shoal, or a piece of land that extends out in the water where we can see it any time?

X Q. 178. A piece of land or rock that stuck out into the water, that you could see any time and that made a swirl down there in the water?

A. Surely,—lots of that kind of knuckles.

X Q. 179. I mean the one just about where this vessel finally struck.

A. I don't know as there is any knuckles there. There might be a shoal made out there. You make a shoal quick in that canal if there is a log there and it forms a shoal.

X Q. 180. There was something that caused a swirl in the water that threw you over towards the south side, was there not?

A. Well, let me explain it to you. This is my best judgment, and then you can judge of the rest. She came along with a good tight hawser until he blowed me them signals. Well, I can't find out no

250 way only it must have formed a shoal there, and when she came up on that shoal, my hawser,—my boat being a little

lighter boat than the ship, killed the headway of the tugboat; and this steamer or vessel, with the swirl of the shoal coming behind her, shot her up on me, and she took a dive for deep water.

X Q. 181. That is, you think there was a shoal there that caused your tugboat to slow up?

Mr. Pillsbury: As soon as I get an opportunity I want to object to the answer that the witness gave. I do not understand he is giving anything except his guess about what happened. I don't understand he testified that there was any shoal there at all.

The Court: I think the answer went beyond the question. That may be struck out.

The Witness: You asked me about a knuckle. I don't know what a knuckle is.

The Court: That is struck out. Just strike that out.

X Q. 182. Did you take the Maryland through there a day or two before?

A. Yes, I took the barge Maryland through,—yes.

X Q. 183. A day or two, or a few days, before that?

A. She was a bad steering barge; yes.

X Q. 184. When you got to that point you found there was difficulty with steering her, didn't you?

A. She was a bad steering barge.

X Q. 185. Well, you found there was great difficulty when you got to that point in steering her, didn't you?

A. Well, around there,—there is a bend, you know, around there.

X Q. 186. And you reported to Captain Geer and Commodore Miller that you had had trouble steering the Maryland; and you did have trouble with this barge at the same place, didn't you?

A. I don't think I reported to Commodore Miller. I may have spoken to Captain Geer about it.

X Q. 187. And didn't you speak to Commodore Miller about it in Captain Geer's presence also?

A. I disremember about Commodore Miller.

X Q. 188. Were you not called before Commodore Miller and Captain Geer and were you not asked questions, and your
251 statements taken down and your answers about this?

A. I disremember about them things.

X Q. 189. Didn't you go before them twice within four or five days and give statements in reference to it?

A. That is hard to tell. I forget about them things, you know. I have often spoken to them about shoals, you know, and where the boats steer bad. But right at that point of time I wouldn't swear what days it was.

X Q. 190. Didn't you tell Commodore Miller in Captain Geer's presence that you knew that a deep draft vessel would act badly in that place?

A. Probably I did.

X Q. 191. You did know it, did you not, and he knew it?

A. Well, he knew that if you go in shallow water, any deep draft vessel will run to deep water,—will act bad in shoal water.

X Q. 192. If you had 25 feet of water there at mean low water, you would not have had any difficulty, would you?

A. I don't think so.

X Q. 193. When you went ashore the second time, was that just after she has passed over the shoal spot that you said you knew about?

A. No, she hadn't got to that.

X Q. 194. She hadn't got to it?

A. No.

X Q. 195. Where was the shoal spot that you knew about?

A. That was, they claimed, just to the westward of Sagamore bridge.

X Q. 196. You didn't know of any shoal spot just before you got to the ferry,—just to the westward of the ferry?

A. Oh, yes, I did; I had heard about that, and there was a digger there, digging there.

X Q. 197. There was a digger there then, digging there?

A. Yes, sir.

X Q. 198. And you knew there was a bad shoal spot there, did you not?

A. Yes, I knew it.

X Q. 199. And the Canal Company knew it too, did they not, because they had a digger there?

A. Yes, they had a digger there.

X Q. 200. And you said she steered finely after she came off and went along all right for about a mile?

A. Oh, no, not a mile, because we didn't go a mile before we sunk
her again

252 X Q. 201. How far?

A. Went four or five lengths along nice, then she commenced to sheer.

X Q. 202. She went along nice until she got up pretty near the ferry?

A. I think she went along all right until she went by where the Chisholm sank.

X Q. 203. Where the Chisholm sank?

A. Yes; best of my recollection.

X Q. 204. That was just before she got to the ferry?

A. Yes, sir.

X Q. 205. And that was right over this shoal spot where they were then digging, was it not?

A. Yes, they were digging, there; the Trilby I think was the name.

X Q. 206. And if she had had 25 feet of water there, she would have gone along all right, in your judgment?

A. I don't know,—there may have been 25 feet there, because they were digging out.

X Q. 207. If they were still digging they didn't have it there, or they would have stopped digging?

A. I don't know anything about that.

X Q. 208. You don't know about that?

A. No, sir.

X Q. 209. But if she had had 25 feet of water there, she would have gone along all right in your judgment, would she not?

A. I couldn't swear to that; she was in bad shape, you know, to go

along up through there, when she went ashore, you know, the day before, and having water in her.

X Q. 210. She was not in as good shape then as she was the day before?

A. No.

X Q. 211. But she did go on until she came to that shoal spot where the digger was working, all right, you say?

A. She went along fairly well; yes; we didn't have any trouble steering her along with one boat behind her,—or one boat ahead of her.

X Q. 212. One boat ahead of her?

A. Yes, sir.

X Q. 213. And if you had had this deep water through the rest of the canal as you had it from where she came off until you struck this shoal spot, she would probably have gone along just the same, would she not?

A. It is hard to tell; it is kind of a worm there in that canal,—you are turning all the time,—it isn't going straight, you know.

253 X Q. 214. She certainly would not have smelled the bottom if she had had 25 feet of water, would she?

A. It is hard to tell; she might have gone over to one side; she wasn't in no shape to go with one boat then.

Redirect examination.

(By Mr. Pillsbury:)

Q. 215. Let us find out where these shoals are that you have been talking about.

A. Well, all right.

Q. 216. What is the point where the boat struck the first day,—it is station 230, is it not?

A. I don't know those stations at all.

Q. 217. You saw it indicated on the map yesterday?

A. I saw Captain Lewis looking at it.

Q. 218. Will you look where he indicated it and see if you agree with it?

A. Well, I didn't see where he indicated.

Q. 219. Look at station 230 and see if that corresponds with your recollection?

A. I don't know the stations.

Q. 220. Perhaps you can tell on the chart better?

A. Yes.

[A chart is produced.]

The Witness: You have got the station where she sunk, have you?

Mr. Pillsbury: I shall have to ask you to fix it, I suppose. I know it, but I want you to fix it.

Q. 221. Captain Lewis said it was station 230. Did you hear him testify yesterday?

A. I heard him, but I didn't—

Q. 222. This is a chart made by Mr. Dunbar, and I don't want you to pay any attention to his marks unless you agree with him.

Mr. Blodgett: I think it is only fair for the captain to say, as he just said, that he does not know.

Mr. Pillsbury: We substantially agree, do we not, that it is 230?

Mr. Blodgett: Mr. Crocker will show where she struck.

The Witness: I have got enough to do with the tugboat without paying any attention to those things.

Q. 223. Then you are not sure where she did strike?

A. If I was there, probably I could show you about where she struck; I know where she sunk.

Q. 224. What shoal was there, to your knowledge, within, say, 1,200 feet of where she struck?

A. I don't know of a shoal——

254 Q. 225. Do you know of any shoal that existed——

A. I have heard of shoals along there.

Q. 226. Do you know of any shoal that existed within a thousand or twelve hundred feet of where she struck?

A. Something there caused that boat——

Q. 227. Just a minute. You know that is not my question. Have you talked with anybody about this case since yesterday, captain?

A. No, sir, I have not.

Q. 228. No one has said a word to you?

A. No, sir.

Q. 229. Did you talk with anybody about it yesterday?

A. No, sir.

Q. 230. Nobody at all?

A. Nobody only you.

Q. 231. That is all?

A. Yes, sir.

Q. 232. Now will you please notice my question? Do you know of any shoal in the canal within a thousand feet of the point that the Bay Port struck on the 13th of December?

A. I didn't see,—there was something there caused the ship——

Q. 233. Do you know of any shoal in that canal within a thousand feet of where the Bay Port struck on the 13th of December?

Mr. Blodgett: Is this redirect examination?

Mr. Pillsbury: It is trying to be as direct as possible.

A. I should suppose you could go ashore if you went on one side, on the bank.

Q. 234. Have you had anything to drink this morning?

A. Well, I had a little coffee and a little oyster stew a while ago.

Q. 235. Have you had anything to drink in the way of alcohol?

A. I haven't had anything to drink for a week or two weeks.

Q. 236. Then there isn't any reason you should not answer my question.

A. What do you mean?

Q. 237. You know what I mean by a "shoal," do you not?

A. Yes,—a shoal; yes.

Q. 238. Now, was there any shoal, to your knowledge, within a thousand feet of where the Bay Port struck on the 13th of December?

A. Well, it must have been,—making the boat—

Q. 239. Did you know of any shoal within a thousand feet?
255 Never mind what must have been. Did you know of any?

A. No, I didn't know it.

Q. 240. That is right.

A. No,—not to know it.

Q. 241. How much water was there at the point where she struck?

A. I don't know.

Q. 242. Where was the nearest shoal that you know of in relation to the point where she struck?

A. Only what I told you before, is what I have been told, that there was a shoal around there.

Q. 243. How far away from it?

A. I couldn't say for that, because I never noticed.

Q. 244. A thousand feet?

A. May have been two thousand, or three thousand.

Q. 245. Might have been two or three thousand. You don't know of any shoal within a thousand or two thousand feet of the point where she struck, do you?

A. No; I don't say for sure, at that. When I say it was a shoal,—it must have been a shoal that she sucked over.

Q. 246. You tell us that there must have been a shoal there, because you think that is why it swirled?

A. Swirled and ran up on my hawser.

Q. 247. And that is what your evidence means,—you think there must have been a shoal there. You don't know of any shoal?

A. No—not unless the ship was given more steam and run up on me.

Mr. Pillsbury: That is all.

Mr. Blodgett: That is all.

Mr. Park: Your Honor, I would like to put a witness on, with your Honor's consent, out of order, as he has got to go away.

Evidence for The T. A. Scott Company, Inc.

ROBERT SHERMAN GARDNER (SWORN).

(By Mr. Park:)

Q. 1. Your full name, Mr. Gardner?

A. Robert Sherman Gardner.

Q. 2. And you are a naval architect?

A. Yes, sir.

Q. 3. In 1916 in whose employ were you?

A. 1916, T. A. Scott Company.

256 Q. 4. And where were you stationed?

A. At New London, sir.

Q. 5. At that time?

A. Yes, sir,—that is, the time of the Bay Port?

Q. 6. Yes.

A. Yes.

Q. 7. Were you at the Bay Port when she was sunk?

A. I got down there after she had sunk the second time, sir.

Q. 8. The second time. You know Mr. Joseph Lewis?

A. Yes, sir.

Q. 9. You have acted under Mr. Joseph Lewis?

A. Yes, sir.

Q. 10. He has been your superior?

A. Yes, sir.

Q. 11. Have you been connected with the Boston office of T. A. Scott Company?

A. Yes, sir.

Q. 12. Were you on the Clyde boat Chippewa previous to December, 1916?

A. Previous to December?

Q. 13. Yes. The Bay Port sank December 13, the first time, 1916. Did you go through the canal on the Clyde line boat Chippewa just previous to that time?

A. I went through the canal on the Chippewa after she was stranded at Wing's Neck.

Q. 14. When the Chippewa was stranded?

A. Yes.

Q. 15. How long previous was that to the time the Bay Port was stranded?

A. I would have to refer to records.

Q. 16. A very short time, was it not?

A. I think so.

Q. 17. Who had charge of the stranded boat Chippewa?

A. Why, Captain Lewis had charge of the salvage operations on her.

Q. 18. Where was she stranded?

A. She was stranded off Wing's Neck.

Q. 19. Outside of the canal?

A. Outside of the canal jurisdiction; yes.

Q. 20. And where did you intend to take her?

A. We intended to deliver her at Boston.

Q. 21. Did you have steamtugs or other help to assist you in taking her to Boston?

A. We had the steamer Beckwith of the Scott Company and the Alert to take her and tow her to Boston. But for the trip through the canal—

Q. 22. I am coming to that now. When you got to the
257 canal did you get any orders from Captain Joseph Lewis about going through the canal?

A. I was on the—

Q. 23. Well, did you get such orders?

A. Yes, sir.

Q. 24. And did you communicate those orders to anybody representing the canal?

A. Yes, sir.

Q. 25. To whom?

A. Captain Ed. Geer.

Q. 26. What orders did you give to Captain Geer that you were instructed to give by Captain Joseph Lewis about going through the canal?

A. I did not give any orders to Captain Geer; but I went to Captain Geer to get orders from him.

Q. 27. Well, did you get any orders from Captain Joseph Lewis?

A. Yes.

Q. 28. What orders did you get?

Mr. Pillsbury: Just a moment. I did not quite get the time of this.

Mr. Park: About a month before the Bay Port sank, a short time before the Bay Port sank. As a matter of fact, your Honor, it was in November.

The Court: How is it material?

Mr. Park: Captain Geer would not allow Captain Joseph Lewis to take that boat through the canal, but insisted she had got to be taken through by the canal people themselves.

Mr. Pillsbury: That hasn't anything to do with this situation.

The Court: I do not see what that has to do with this case.

Mr. Park: May it please your Honor, it is our defence that the Scott people were sent down there to save a stranded vessel. They got her off, and I propose to show by the canal authorities themselves that the minute that boat got into the water The T. A. Scott Company had nothing more to do with it; but the Canal Company, according to their rules and regulations, would insist on their boats and their pilots taking her through the canal.

The Court: You can show the general course of business, but you cannot show special instances.

Mr. Park: That was the general course of business.

The Court: I exclude the inquiry as far as it has gone now.

Mr. Park: That was the purpose of it.

258 The Court: If you merely want to show what was done with a single steamer a month before, I do not think it is competent.

Mr. Park: Only to show what the general course of business of the canal was.

The Court: You may show that in a different way.

Mr. Park: I can show it through the canal authorities, your Honor.

The Court: Very well. This evidence I exclude.

Mr. Park: I took this out of order, because the witness has got to go away. I would not have called him now, but he can't come again.

The Court: I am against you on the admissibility of it, Mr. Park, so I exclude it and save your exception.

Mr. Park: That is all.

The Court: I do not rule upon whether the evidence may not be admissible in another aspect of the case after the defendants testify.

Mr. Park: I am taking my chances in calling the witness now, because he can't come again.

The Court: It may well be perfectly admissible if the Canal Company should take certain positions.

Mr. Park: Their libel charges it.

The Court: I think at present it is not admissible.

Evidence for Boston, Cape Cod & New York Canal Company.

WILLIAM H. MYERS (sworn).

(By Mr. Pillsbury:)

Q. 1. Your name?

A. William H. Myers.

Q. 2. What is your business, Mr. Myers?

A. Chief engineer.

Q. 3. Of what boat?

A. Tug Fred B. Dalzell.

Q. 4. What,—the tug Dalzelline?

A. Yes,—she has been renamed the Fred B. Dalzell.

Q. 5. That is the same tug we have been calling the Dalzelline?

A. Yes, sir.

Q. 6. You were her chief engineer in December, 1916, when this accident happened?

A. I was.

Q. 7. Were you on her the day of the first striking, the 13th?

A. Yes, sir.

259 Q. 8. Were you on her when she went out to pick up the Bay Port and assist her through the canal?

A. Yes, sir.

Q. 9. You were also on her the day of the 14th?

A. Yes, sir.

Q. 10. Now, Mr. Myers, I wish you would tell us, perhaps briefly, just what you recall of the course of events, starting from the time that you went out to the Bay Port when she arrived outside of the canal, and what happened that first day, and then later what happened after she struck. You were in the engine-room, were you not?

A. I was; yes.

Q. 11. What opportunity did you have to observe? Will you tell us that first before you tell us about the happenings? What opportunity did you have to observe?

A. What opportunity?

Q. 12. Yes.

A. I could look out of the engine-room through the door and windows at any time, because the engine-room was on the upper deck; it was not below deck.

Q. 13. Now, will you tell us what you yourself observed?

A. I noticed when we got to the steamer and we started through

the canal, I noticed that she took several small sheers, but they were easily broken.

Q. 14. You say when you "started in the canal." Can you tell me when that was with relation to the railroad bridge that she began to sheer?

A. I couldn't recall exactly now.

Q. 15. I know, not exactly, but was it in the vicinity of the railroad bridge?

A. Below it, I believe.

Q. 16. Below it,—that is, to the westward of it?

A. If I am not mistaken,——

Q. 17. Or do you mean to the eastward? What do you mean by "below"?

A. To the eastward, towards Sandwich.

Q. 18. Now, you say she took some—as you described it—"small sheers"?

A. Yes.

Q. 19. Go ahead; go right on and tell us the story.

A. Well, we proceeded through the canal, and finally I—at different times I would get a bell for more speed, and I answered them the same as I got them, and gave the engine full speed, and every time we would break the sheer, until finally she struck.

Q. 20. How many sheers would you say she took from the 260 time she entered the canal up to the time that she struck?

A. Oh, probably two or three; possibly four.

Q. 21. And were those spread out along the canal from the entrance up to the time she struck?

A. At different places; yes.

Q. 22. At different places. Do you know anything about the depth of water in the canal at that time?

A. I do not.

Q. 23. You do not know about that?

A. No, sir.

Q. 24. Were you there when Joseph Lewis arrived?

A. I couldn't say.

Q. 25. You were not there over that night, were you?

A. What is that?

Q. 26. You were not there over the night?

A. No; I was relieved at 6 o'clock.

Q. 27. And the night crew went on, and you came off?

A. Yes.

Q. 28. What time did you come on the next day?

A. Six o'clock the following morning.

Q. 29. Tell us what condition of affairs existed at 6 o'clock in the morning when you got there.

A. The steamer was still ashore, lying with her head, her bow, on the south bank as she grounded; and the three tugboats were there and I understand had been there all night. And we changed crews; and the night crew left us and we remained there by her; and we were laying under the bow—no, I am wrong; I can't just state where we were lying at the time, on what part of the ship;

but anyway we were there; and they expected to float her at high water, which I think was around 12 o'clock. But she came off unassisted around 10,—in the neighborhood of 10 o'clock. At the time she came off we were lying under her bow, the tug Hazelton and the tug Dalzelline; and the tug Stuart was lying on her after port quarter. And when she came off we got a hawser off the bow and started to tow her through the canal. The tug Hazelton went to get a line off the stern,—I imagine that was what he was trying to do; but before he could get a line off the stern, why, she fetched up the second time. That was on the 14th.

Q. 30. When you say "fetched up," you mean went aground?

A. Yes, sir,—well, before she went aground,—I am a little ahead,—before she went aground she took a bad sheer,—after we started through the canal she took a bad sheer for the lighter Trilby. This Trilby was lying in the canal, working there, and she took a pretty bad sheer to starboard; and I got an extra jingle bell again, and I put the engine at full speed, and we broke this sheer. Then we only went a short distance when she took an 'opposite sheer to port, and this time we couldn't break the sheer. That is the time when she grounded the second time.

Q. 31. What was her condition as to trim when she went off the bank?

A. I really couldn't just state that. I know she was down by the head; I noticed that.

Q. 32. And did she have a list at all?

A. I can't recall that; no, sir.

Q. 33. Had you seen the diver working there?

A. I saw a diver there; yes, sir.

Q. 34. And did you see Captain Joseph Lewis there the morning of the 14th?

A. I was told that was who it was; yes.

Q. 35. What did you see him doing?

A. Why, I didn't take any particular notice. I see him around on the ship; that was about all I noticed of what the man was doing.

Q. 36. Did you see any hawser attached to the bank, any means of keeping her against the bank, provided that morning?

A. I didn't notice any; no, sir.

Q. 37. Mr. Myers, referring to the time on the 13th, even before the Bay Port actually got into the canal, will you tell us whether or not she took any sheer?

A. It appears,—it seems to me that she did, a couple of small sheers, but they were easily broken.

Q. 38. Where was she when she took those sheers?

A. This was outside the canal after she left Wing's Neck, before she got to the canal.

Q. 39. On the way from Wing's Neck to the canal?

A. To the canal; yes, sir.

Q. 40. You were not in the employ of the Cape Cod Canal Company, were you?

A. I was.

Q. 41. At this time?

A. Yes, sir.

Q. 42. Do you mean to say they paid you your wages,—or
262 was it the Cape Towing Corporation?

A. Well, I don't know really who it was that paid me; but I used to get my money right there; I don't know who it came from.

Q. 43. You got your money at the building there,—that is all you know, is it?

A. Yes, sir.

Cross-examination.

(By Mr. Blodgett:)

X Q. 44. How long had you been on the Dalzelline?

A. How long have I been on her?

X Q. 45. How long had you been on her at that time?

A. Up to that time?

X Q. 46. Yes.

A. Twelve years.

X Q. 47. And you got your money in the same way you had always got it, did you not, at the canal?

A. Previous to that I got my money from the New York office of the people I was working for in New York.

X Q. 48. I say, while you were at the canal, you got it the same way you always got it down at the canal?

A. Oh, yes. I don't know who was paying it.

X Q. 49. Were you handling your engine, yourself, on that day?

A. I was.

X Q. 50. And while you were handling the engine were you looking out, looking aft to see how the Bay Port was coming,—whether she was taking a slight sheer or not?

A. I would occasionally look out.

X Q. 51. And did you look out on two occasions and see her take two slight sheers before she entered the railroad bridge?

A. I looked out on several occasions, different times.

X Q. 52. And you happened to look out when she took two slight sheers?

A. I did.

X Q. 53. How much do you think she sheered on those two occasions?

A. I really don't know.

X Q. 54. Do you know she sheered at all?

A. I do.

X Q. 55. Did you see her actually sheer?

A. I did.

X Q. 56. How many points did she sheer?

A. I couldn't answer how many points.

X Q. 57. Did she sheer off more than an ordinary vessel
263 does with a tug ahead of her, when she is under her own steam?

A. I couldn't answer that; I don't know.

X Q. 58. Well, you have looked out at other vesesls, I suppose? You have been towing through the canal quite a bit?

A. Oh, yes.

X Q. 59. And you have looked out at other vessels when you have had them astern of you?

A. Yes.

X Q. 60. Did she sheer any more than other vessels did?

A. Well, I don't know; I can't really say that she did or that she didn't.

X Q. 61. The first of any consequence that you noticed was just before she went aground the first time, was it not?

A. Well, I got a signal.

X Q. 62. Yes. Did you look out when you got that signal?

A. After I put the engine at full speed, I did.

X Q. 63. And then you looked out and saw her sheering to star-board?

A. Yes, sir.

X Q. 64. And how long after you got your signal was it, do you think, before she fetched up?

A. Very short time.

X Q. 65. Two or three minutes?

A. No, I don't think it was as long,—well, possibly two minutes, —a minute or so; I don't just remember exactly.

X Q. 66. Then on the second day when you started with her, you did not notice any sheers until shortly before she landed the second time, did you?

A. Right after we started, we only went a short distance when I got a signal again in the engine-room, and I put the engine at full speed and looked out, and she was sheering again.

X Q. 67. That was when you were right up by the lighter Trilby?

A. Yes, sir.

X Q. 68. Were you abreast of the Trilby?

A. We were ahead of the Trilby.

X Q. 69. You were ahead of the Trilby, and she was about abreast of the Trilby?

A. About.

X Q. 70. About abreast the Trilby. And that was a bad sheer?

A. Yes.

X Q. 71. But you did succeed in breaking it?

A. Yes.

X. Q. 72. And then she sheered the other way?

A. Yes.

264 X Q. 73. To the north bank?

A. Yes.

X Q. 74. And then she struck the north bank?

A. Yes.

Redirect examination.

(By Mr. Pillsbury:)

Q. 75. Mr. Myers, you formerly worked for the company that owned the tug Dalzelline, did you not?

A. Yes; Fred B. Dalzell & Company.

Q. 76. And you were on that tug when she was chartered to the Cape Towing Corporation?

A. Yes, sir.

Q. 77. When was that?

A. It was in the month of September, but I don't remember the day,—the latter part of September.

Q. 78. Up to the time that tug was chartered to the Cape Towing Corporation, who paid you your wages?

A. Fred B. Dalzell & Company.

Q. 79. Dalzell & Company?

A. Yes.

Q. 80. And after the time that she was chartered to the Cape Towing Corporation you got your money at an office there in the canal building?

A. Yes, sir.

Q. 81. And that is all you know about it?

A. That is all.

Q. 82. You do not know whether it was the Cape Towing Corporation that paid you or who it was?

A. I understood it was.

Q. 83. You understood it was the Cape Towing Corporation?

A. Yes, sir.

Q. 84. You never have been paid any wages by the Cape Cod Canal Company, have you?

A. Cape Cod Canal Company?

Q. 85. Yes.

A. I don't really know which one.

Q. 86. Do you know anybody in the situation as far as your employment is concerned except the Cape Towing Corporation?

A. That is all.

Mr. Pillsbury: That is all.

MICHAEL J. DONNELLY (sworn).

(By Mr. Pillsbury:)

Q. 1. What is your name, Mr. Donnelly?

A. Michael J. Donnelly.

Q. 2. Where do you live?

A. I live aboard a boat, the Holyoke, New York.

265 Q. 3. And in December, 1916, what was your occupation?

A. Well, I was mate aboard the tugboat Dalzelline.

Q. 4. Mate of the tug Dalzelline?

A. Yes, sir.

Q. 5. Were you the one that Captain Lecompte put out on the stern to watch that day that you towed the Bay Port, the first day?

A. Well, I went out there on my own hook at the beginning; and then after we got into the canal, then he told me to stay out there.

Q. 6. That is, you were on the Dalzelline when she went out to the Bay Port on the 13th?

A. Yes, sir.

Q. 7. That is, when you picked her up?

A. Yes, sir.

Q. 8. And you were on the stern of your tug until she struck, if I understand it?

A. Yes, sir.

Q. 9. Now, at what point was it that he stationed you there, instructing you to watch the ship?

A. That he instructed me?

Q. 10. Yes; where were you when he put you out on the stern of your tug to watch?

A. He told me to watch,—that was just about the time we entered the canal; because I left the stern, you see, when we got into the canal,—she began sheering out there, you see, and I went in the engine-room, and I got an axe.

Q. 11. She began to sheer where?

A. Outside of the canal. Well, I went in the engine-room, and I got an axe so that I could use it if she turned us around. It isn't like it is in the canal, and I was afraid she was going to turn our boat around or sink us if she didn't get us around, or if we didn't ease up on the wheel, she would turn us over, and I thought I would have an axe ready to clip the hawser, so as to free us. When we got in the canal I didn't think there was any danger then, but he told me to stay out there.

Q. 12. He told you to stay out there with an axe?

A. Not with the axe, but stay there and watch things and sing out to him.

Q. 13. Describe how the boat acted from the time she entered the canal up to the time she struck.

A. Well, the boat never did act like a boat ought to have acted.

Mr. Blodgett: I ask that that be struck out. Let him tell what he saw.

Mr. Pillsbury: I think very likely that is true,—that is characterizing it.

266 The Court: Yes.

Mr. Pillsbury: I will consent to have that go out.

Q. 14. Just state, as Mr. Blodgett suggests, what you saw her conduct to be. How did she act as you saw her act?

A. That is, from the time we took the ship, or just in the canal?

Q. 15. We will start from the time you picked her up until the time she struck.

A. After she got under way she sheered; that is, she was taking

sheers the whole while. That is the reason I was uneasy about her outside.

Q. 16. After she went into the canal, just tell us how she acted.

A. Well, she acted about the same way, but there was no danger of her turning us around in the canal, you see. That is why I walked back up and went in the pilot-house. And Captain Leconte told me I had better go on the stern.

Q. 17. Can you speak so Mr. Blodgett can hear you?

A. If he has got good hearing, I can; yes, sir.

Q. 18. Can you speak a little louder than that?

A. Yes, sir, I can.

Q. 19. Now, will you go ahead?

A. Well, I don't know anything else; that is, the boat didn't handle right,—that is, the Bay Port; she wasn't a good handling boat in the condition she came in; she was sheering constantly from the time we first took hold of her until the time she hit.

Mr. Blodgett: I object to the answer and ask that it be struck out.

The Court: That last part may stand. The first part may go out.

Q. 20. Did you notice anything about her trim that day?

A. Yes, sir; she was low at the bow.

Q. 21. Low at the bow?

A. Yes, sir.

Mr. Blodgett: The first day?

Mr. Pillsbury: Yes.

Q. 22. Now, when did you see her the next day?

A. The next day?

Q. 23. Yes, the 14th.

A. I wouldn't describe the exact place, but it was the place—

267 Q. 24. I will put it another way. How long were you with the boat after she struck?

A. How long with her? Well, we were with her until probably 6.30; something like that. We were relieved, you see, by the night crew.

Q. 25. Had Captain Joseph Lewis arrived at the time you were relieved at 6 o'clock on the night of the 13th, do you remember?

A. No, sir; I don't know.

Q. 26. When do you remember seeing him first?

A. Well, the first time I saw him we were down there, after we relieved the other crew, and he was on the steamer.

Q. 27. On the Bay Port?

A. Yes, sir.

Q. 28. And when was that—the next day?

A. Well, that was a little while before she floated?

Q. 29. The next day?

A. Yes, sir.

Q. 30. When did you get to the steamer the next day?

A. Well, our boat was there, you see; but we went there the next morning about 6 o'clock.

Q. 31. The day crew—you and the day crew went there about 6 o'clock?

A. Yes, sir.

Q. 32. Did you see her when she went off?

A. Yes, sir.

Q. 33. What was her condition after she had gone off, as to trim?

A. As to trim?

Q. 34. Trim; yes.

A. Well, she was low at the bow then when she came off.

Q. 35. Did she have a list?

A. That is—what do you mean; to port or starboard?

Q. 36. To port or starboard?

A. Well, I wouldn't say that.

Q. 37. You don't remember?

A. I don't know.

Q. 38. Now describe in your own way what your tug did and what the Bay Port did and what happened from the time she went off?

A. Well, when she floated, you see, all of a sudden—that is, I don't think there was really anyone expecting it—and, well, of course, as soon as she floated, why, we got a hawser on her as quick as we could, trying to keep her, but our captain told Captain Lewis—I didn't know his name was Lewis at the time—that he thought we should have to hold that boat up, that it was a bad time to get it out with the tide and the boat in the condition she was in.

268 Q. 39. When was this—before she floated?

A. What?

Q. 40. Was this before she floated?

A. Just about the time she was floating.

Q. 41. What reply did Captain Joe Lewis make to that suggestion?

A. Well, he told him that he knew his business. He said, "Do as I tell you, Cap."

Q. 42. Well, go on.

A. That is all I knew. We took a hawser then and went and tried to keep the Bay Port in shape as much as possible.

Q. 43. How far did the Bay Port go before she struck the second time?

A. Well, I wouldn't say exactly how far she went, because—I will tell you—I was watching—I was pretty busy, and I wasn't paying much attention to the Bay Port; I was just watching her sheering, and one thing and another.

Q. 44. What did you see her do in the way of sheering on this occasion?

A. Well, I see the boat sheering then.

Q. 45. How soon after she floated did she begin to sheer?

A. Well, practically from the time that she got afloat she was sheering—or got any headway at all on her, she was sheering.

Q. 46. And that was true up to the time that she struck?

A. Yes, sir.

Q. 47. And when did you see the captain of the Bay Port in relation to the time that she struck?

A. When did I see him?

Q. 48. Yes; how soon after she struck did you see the captain to talk with him or hear him say anything about the accident?

A. Oh, I saw him a day or two after—might have been three days; I won't say exactly when.

Q. 49. Where was it?

A. Well, this was right in front of the office of the Cape Cod Towing Company.

Q. 50. Who was present, who were there?

A. Well, he was on the dock, and I think Cap-ain Lecompte was up in the pilot-house, in the window, looking out of the window. We were made fast to the dock.

Q. 51. Who was with Captain Hammett and you; who else was there in the group?

A. There was no one with him. He walked down, I
269 suppose—walked down there probably to see the sights or something. There was no one with him.

Q. 52. Did he say anything as to this accident?

A. Well, we got talking about it. I said something about the Dalzelline, before that, getting a new steering engine in her, you see, and that the old steering engine didn't work right on the Dalzelline; and that on account of that steering gear not working right we hit the bank, ourselves; and, of course, we rigged up and got a new steering engine on her. And—well, he says, "My old tub has gave me a lot of trouble that way, too."

Cross-examination.

(By Mr. Park:)

X Q. 53. Where did Captain Joseph Lewis stand at the time of this alleged conversation between Captain Lecompte and Captain Lewis?

A. At that time he was on the bridge of the Bay Port.

X Q. 54. And where was your boat?

A. Our boat? Well, we were maneuvering around the bow.

X Q. 55. She had come off at that time?

A. Sir?

X Q. 56. The Bay Port had come off at that time?

A. Yes, sir.

X Q. 57. And the Captain Lewis you refer to was upon the bridge of the Bay Port?

A. Yes.

Mr. Park: That is all.

(By Mr. Blodgett:)

X Q. 58. You say that before you got this vessel into the canal you had gone to get an axe because you were afraid for your life?

A. Yes.

X Q. 59. Did you call that to the attention of Captain Lecompte?

A. How is that?

X Q. 60. Did you call that to the attention of your captain?

A. No, sir.

X Q. 61. Why didn't you report it to him?

A. Well, that is the custom on the boats, you know, for deck-hands and men under the captain—why, they generally do these things, you know; they don't have to be told—and the captain looks for you to do these things.

X Q. 62. That is, the captain puts you out there to be
270 stern lookout, I suppose?

A. Not at that time, he didn't put me out there.

X Q. 63. He did not?

A. No.

X Q. 64. And you were so fearful, from the way the Bay Port was acting, of your life that you went down to get an axe without saying anything to him about it?

A. Well, I wouldn't say "of my life," but I was afraid she would turn the boat around—probably turn her over or something.

X Q. 65. And you wanted to be ready to cut that hawser?

A. Yes, sir.

X Q. 66. Was not that a thing that you would naturally report to your captain?

A. How is that?

X Q. 67. Was not that a thing that was so serious you would naturally speak to your captain about it?

A. Well, if you want me to explain this thing to you—

X Q. 68. No. Was not that a thing you would naturally speak to your captain about?

A. No.

X Q. 69. Did you attempt to give any signals to the Bay Port to call her attention to her bad steering and ask her to steer better?

A. No.

X Q. 70. Don't you have signals to give to the tow when you notice they are steering bad, to correct it?

A. Well, if the tug gets out too far—if the steamer takes a bad sheer, or if they hold off so that we are in danger ourselves of turning over or anything—well, if we don't want to cut the hawser, we will blow a danger signal, to get them to slack out on their hawser.

X Q. 71. Don't you have a set of signals also that you blow to the tow to tell her to port her helm or starboard her helm?

A. No. The captain aboard the ship, or whoever is in charge, is supposed to be competent enough to know that.

X Q. 72. Do you mean to say that you have been towboating for years and that you do not know of the fact that tugboats constantly give signals to their tow to either port or starboard?

A. If you are out at sea.

X Q. 73. Don't you know that is done, and don't you know that you have signaled in that way?

A. I know we have got different signals, and probably I
271 know all the signals. But there is different conditions, there
is different cases, you know.

X Q. 74. You have answered my question.

A. There is different things,—the pilot or the captain aboard of
the ship is in charge of the tugboat ahead and all other tugs,—we
got no say about that.

X Q. 75. Is not the tugboat generally in charge of his tow?

A. If you are out at sea, with no pilot, he is; but not in a harbor
where there is a pilot and master aboard,—licensed men,—no.

X Q. 76. Was that a special rule of the Cape Cod Canal that the
pilot on the vessel was in charge?

A. Well, I have steamboated practically all over anywhere from
South America to New York, and it is practically the same thing,
that the pilot or master of the ship is in charge.

X Q. 77. The master of the ship is always in charge, even if he
has a tugboat ahead of him, towing him?

A. If he is a pilot and he has pilotage for the waters he is cover-
ing.

X Q. 78. If he has got a pilot's license for the waters he is cover-
ing?

A. Yes, sir.

X Q. 79. After your vessel went on through the railroad bridge,
you were then told to keep a lookout on the stern, by your captain.
I understand?

A. Yes, sir; the captain—you see when we entered the canal the
captain told me to stay back there,—he made me go back there
again.

X Q. 80. He told you to stay there and keep a lookout?

A. Yes.

X Q. 81. Did you make any reports to him at all until the Bay
Port took the sheer when she went aground?

A. Yes.

X Q. 82. What did you report?

A. Why, two or three times I sung out to him to starboard or
something, or hook her up,—when probably he wasn't looking back,
or something.

X Q. 83. And did he hook her up every time you called out to
him to hook her up?

A. Yes, sir.

X Q. 84. And how many times did you call that out until the
last time?

A. Well, at least four times, anyhow.

X Q. 85. At least four times, and he did it every time?

A. Yes.

272 X Q. 86. So far as you could see, the tugboat acted per-
fectly properly?

A. The tugboat did; yes, sir.

X Q. 87. Yes,—and there was nothing that the tugboat could
have done to have prevented the accident?

A. No, sir.

X Q. 88. And if the boat had not taken the heavy sheer she did just three or four lengths away from where she struck, there would not have been any accident, would there?

A. How is that?

X Q. 89. I say, if the steamer had not taken the heavy sheer which she took three or four lengths away from where she finally brought up, there would not have been any trouble, would there?

A. She didn't sheer three or four lengths before she took the sheer,—probably a length or so,—the same sheer she had always taken.

X Q. 90. Was it any heavier sheer than she had taken before?

A. No, I wouldn't say it was, only that time,—why, we didn't get it broken; and we had more water outside, you know, bigger room, before we entered the canal, to work with, and we could pull off more, you know, outside the canal.

X Q. 91. Are you talking about outside of the canal now?

A. Outside and in, both, I thought you were talking about.

X Q. 92. I thought you were talking about the time she struck.

A. I thought we were talking about from the time we picked the ship up.

X Q. 93. Which one were you talking about?

A. Well, just anyone you want me to talk about. You asked me—

X Q. 94. I am asking you—

A. —you asked me if she had taken any bigger sheers than she did on that sheer; so that is mentioning both times; and I says no, I didn't see any difference.

X Q. 95. After she got into the canal, the biggest sheer she took was just when she struck, was it not?

A. No, I wouldn't say that.

X Q. 96. She took bigger sheers in the canal?

A. No, I don't say that, either.

X Q. 97. You didn't say that?

A. I didn't say that; I said I couldn't notice any difference,—much,—in the sheers.

X Q. 98. They were all the same?

A. No, I wouldn't say they were all the same, but I say I never paid any attention to that being bigger or smaller than the other.

273 X Q. 99. The only difference was that you broke the sheers before; and this time, although you tried your best, you could not break it?

A. Well, that time—

X Q. 100. Well, wasn't that so, that you had broken the sheers before; and this time, although you did the best you could, you could not break it?

A. Well, that was, you see, because the steamer had a way on her—

X Q. 101. Isn't that the fact?

A. What is the fact?

X Q. 102. That you had broken the sheers before, and you could not this time although you tried your best?

A. It must have been the fact, because she wouldn't have hit if we had broken it; that is a fact, certainly.

X Q. 103. You never navigated a boat through the canal, yourself?

A. Well, I have navigated,—that is, had a licensed man up there with me, though,—that is, under his direction.

X Q. 104. That is, you steered under a pilot's direction; you had no license at all?

A. No, sir.

X Q. 105. Of any kind?

A. No, sir.

X Q. 106. Now, after she got ashore the first time and started off, were you standing aft again?

A. Yes, sir.

X Q. 107. Who told you to go there then?

A. I wasn't told to stay there then, because that was my business; that is, to stand by a hawser or anything of that kind.

X Q. 108. And the boat went along all right for some little distance, did she not, after she came off?

A. No; she floated, and we had to get her around, you see, from the time she got off,—we had to straighten her out.

X Q. 109. She went along all right for some little distance, did she not?

A. No, not any better than she did before.

X Q. 110. Well, she went along about the same as she did before until she got up by the Trilby, did she not?

A. Well, we were just beginning to get her straightened out,—from the time she got afloat, we just began to get her straightened out, and she made that sheer for the Trilby then.

X Q. 111. When she got up by the Trilby, she took a sheer?

A. Took a sheer.

274 X Q. 112. And then you tried to break that sheer, and she took a sheer to the north and struck?

A. Well, we broke that sheer from the Trilby.

X Q. 113. The sheer to the south you broke?

A. Yes, to the starboard.

X Q. 114. And then the steamer sheered to the north and struck?

A. Yes, a few minutes after she had taken that sheer.

Redirect examination.

(By Mr. Pillsbury:)

Q. 115. Mr. Donnelly, did I understand you to say that she took the sheer before she struck the first time about a length from where she struck?

A. Why, I imagine—yes, sir; about that.

Recross-examination.

(By Mr. Blodgett:)

X Q. 116. Just one thing I forgot. You said that you had noticed that when she entered the canal she was down by the head?

A. I noticed that from the time we picked her up,—first got her under way.

X Q. 117. How much, in your judgment, was she down by the head when you picked her up?

A. I imagine she was probably a foot; something like that.

X Q. 118. Did you see what she was drawing aft?

A. No, sir; I didn't see what she was drawing on either end.

X Q. 119. You just judged she was down a foot by the head by looking at her?

A. Yes, sir.

X Q. 120. You didn't see her marks?

A. No, sir; but she was down at the head.

X Q. 121. You are sure of that?

A. Yes, sir.

X Q. 122. She was drawing a foot more, you *saw*, forward than she was aft when she entered the canal?

A. Yes, sir.

X Q. 123. You are sure of that?

A. Sure of it.

X Q. 124. You are as sure of that as of anything you have testified to here?

A. Anything I have testified to here; yes, sir. Now, of course, I wouldn't say right straight, you know, right at the bow, because you know her bow curves,—on a steamer like that, it curves. You have got a little bit of it down at, as I would call it, the head. I don't mean to say that the very end of the bow was down, 275 you know, the further end, because they come up there; but she was what I would call down at the bow,—she was down there; in other words, her lines were down further there than her lines aft.

X Q. 125. Do you mean to say any part of her drew more than her stern when she entered that canal?

A. When she came down to the lines of her bow; yes.

X Q. 126. You say some part of her drew more than her stern?

A. Yes.

X Q. 127. Did you ever see one of those boats out on the dry-dock?

A. Yes.

X Q. 128. Do you know how they are built?

A. Yes.

X Q. 129. And you still say that some part of her drew more water than her stern?

A. Yes, sir.

X Q. 130. You said you talked with Captain Hammett some days

afterwards about your steering gear, about your having trouble with your steering gear on your tug some time?

A. Yes.

X Q. 131. And he told you that his "old pig" was giving him a lot of trouble, too?

A. I understood him to say that was "no worse than my old tub"; something similar to that.

X Q. 132. I understood you gave his exact words in your direct examination.

A. No, I didn't give it exactly.

X Q. 133. Did he use the words "my old tub"?

A. Yes, sir.

X Q. 134. Did he tell you how long he had been in his "old tub"?

A. No, sir; he never said anything about that.

Mr. Blodgett: That is all.

Mr. Pillsbury: That is all, Mr. Donnelly.

DANIEL H. MCGILVRAY (sworn).

(By Mr. Pillsbury:)

Q. 1. What is your name?

A. Daniel H. McGilvray.

Q. 2. Where do your live?

A. Buzzard's Bay.

Q. 3. What is your occupation?

A. Pilot on the canal.

Q. 4. In December, 1916, what was your occupation?

A. Night captain on the Dalzelline.

276 Q. 5. Night captain. Did you have anything to do with the Bay Port until after she had struck the first time?

A. No, sir.

Q. 6. What time did you arrive at the scene?

A. Somewhere between 6 and 7 o'clock in the evening; I couldn't say just for sure when.

Q. 7. When did you first see Joseph Lewis?

A. At the canal office before we went down there.

Q. 8. What talk did you have with him at the canal office, or what talk did you hear anyone have with him at the canal office?

A. Didn't have any talk with him that I remember of.

Q. 9. Did you take him up to the wreck, to the boat?

A. No, sir,—well, he went on the boat that we all went on; we changed crews on the Patrol, if I remember correctly.

Q. 10. And you all went up together?

A. Yes, sir.

Q. 11. What did you see him do at the wreck after you got there?

A. I didn't see him do anything, only I remember he was there when we got there.

Q. 12. He went aboard the Bay Port?

A. He went aboard the Bay Port, as far as I know.

- Q. 13. At any time on that evening did he give you any orders?
 A. Only to go back to Buzzard's Bay after he came back aboard of the boat I was on, the Dalzelline.
- Q. 14. What time was that?
 A. I don't just remember; it might have been 7 or 8 or later.
- Q. 15. Were you there during the night after that at all?
 A. No, sir.
- Q. 16. What time did you get there the next morning?
 A. About 5 o'clock, I presume.
- Q. 17. What was the situation of affairs then?
 A. The same as they had been the night before as far as I could see.
- Q. 18. The boat was lying in the same position as the night before?
 A. The same position.
- Q. 19. Was she fastened to the bank in any way?
 A. Beg pardon?
- Q. 20. Was she made fast in any way?
 A. Not that I know of.
- 277 Q. 21. Did you see Joseph Lewis that morning around there?
 A. Yes, sir.
- Q. 22. What did you see him doing?
 A. Standing aboard the Bay Port, that is all.
- Q. 23. What was going on in the way of pumping water out of the ship, if anything?
 A. I was told that the ship's pump was working.
- Mr. Park: I move to strike that out.
 Mr. Pillsbury: All right, strike that out.
- Q. 24. Did you see them lightering the coal out?
 A. No, sir.
- Q. 25. Were you there when she floated?
 A. No, sir.
- Q. 26. What time did you leave?
 A. Between 6 and 7 in the morning. We were supposed to change crews at 6.
- Q. 27. You don't know anything more about it after you left?
 A. I don't know anything more about it.
- Mr. Pillsbury: That is all.
 Mr. Park: Nothing.

Cross-examination.

(By Mr. Blodgett:)

X Q. 28. Did you ever, Mr. McGilvray, receive information from the Canal Company's office at any time prior to this accident about the existence of shoal spots about where this vessel struck?

A. No, sir.

X Q. 29. Had you ever received any information from the office as to whether they had found there 18 or 19 feet of water?

A. No, sir.

X Q. 30. They never gave that information to you?

A. I didn't hear anything about it.

X Q. 31. Did you ever receive any information about any dangerous places in the canal,—in the construction of the canal?

A. No, sir; not in particular,—no.

X Q. 32. Not from the Canal Company?

A. No, sir.

X Q. 33. Were you a member of the Pilots' Association, so-called?

A. No, sir.

Redirect examination.

(By Mr. Pillsbury:)

Q. 34. You were not a pilot at that time?

A. No, sir.

278 Q. 35. Are you a member of the association now?

A. No,—well, three of us are working together, separate from the canal altogether.

Q. 36. Three of you together?

A. Yes.

Recross-examination.

(By Mr. Blodgett:)

X Q. 37. There isn't any association, is there, now?

A. No Pilots' Association. There are three pilots working together, separately from the canal, at this time.

Mr. Blodgett. Yes. That is all.

AUGUSTUS F. WAGNER (sworn).

(By Mr. Pillsbury:)

Q. 1. Your name, captain?

A. Augustus F. Wagner.

Q. 2. Where do you live?

A. Buzzard's Bay.

Q. 3. What is your occupation now?

A. Pilot on the canal.

Q. 4. When this accident occurred what was your occupation?

A. Day captain of the tug Hazelton.

Q. 5. When was the first time you saw the Bay Port, about what time?

A. About half-past 2 in the afternoon that she struck.

Q. 6. That she struck the first time?

A. Yes, sir.

Q. 7. You came in consequence of the whistles that you heard, did you?

A. No, sir; an order given at the Sandwich end.

Q. 8. An order to go to her assistance?

A. Yes, sir.

Q. 9. By Captain Geer?

A. By a collector that came out and told me to go to the assistance of the Dalzelline and the Bay Port.

Q. 10. A collector, did you say?

A. Yes, sir.

Q. 11. He told you what?

A. To go west to the assistance of the Dalzelline and the steamer Bay Port.

Q. 12. When you got there, what did you see?

A. The steamer was aground on the south bank, and the tug Dalzelline lying alongside.

Q. 13. What did you observe from that time until you left?

A. Well, we tried to pull on her, pull her off the bank; but the tide had fallen so far that she wouldn't come off. Tried to put a siphon in,—couldn't get no place to put it in.

279 Q. 14. No place on the ship to put it in?

A. On the ship; no, sir.

Q. 15. Did you hear the captain say anything about that?

A. Captain of the ship?

Q. 16. Captain Hammett?

A. No, sir.

Q. 17. Go ahead.

A. We remained there until they changed crews between 6 and 7.

Q. 18. You went off at that time?

A. I went home; yes, sir.

Q. 19. When did you come back to the scene?

A. About 6.30 the next morning.

Q. 20. Was that the first time you saw Joseph Lewis?

A. In the morning; yes, sir.

Q. 21. Where was he when you first saw him that morning?

A. On the deck of the Bay Port.

Q. 22. What did you observe him doing or observe the men acting under his directions doing from that time up to the time that the boat floated?

A. Why, I suppose a diver was working; I saw a pump for a diver working; I suppose he was on the inshore side of the ship, working on her. Captain Lewis was on the ship. I didn't see him doing anything in particular.

Q. 23. Did he give you any orders?

A. Yes, sir.

Q. 24. What orders did he give you?

A. Told me to proceed to Sandwich for the wrecking lighter Salvor.

Q. 25. To proceed to Sandwich and get a lighter?

A. Yes, sir.

Q. 26. Did you do that?

A. Yes, sir.

Q. 27. When you got the lighter there, what was done?

A. Why, we put the lighter alongside of the ship, about amid-ships, moored her there and dropped down to the bow of the ship so as to be less strain on the ship.

Q. 28. Was there any coal unloaded into the lighter?

A. If any, very little.

Q. 29. Now, tell us in your own way what happened next.

A. About—a little after 10, why, the steamer floated off, started off into the canal.

Q. 30. What was her condition as to trim after she got into the deep water of the canal, after she floated off?

A. She was by the head.

280 Q. 31. What did you do when she floated off?

A. Why, Captain Lewis called out to me to take the lighter Salvor.

Q. 32. Captain Joseph Lewis?

A. Yes, sir. And while I was getting a line off the bow of the ship, he turned right around and said, "Never mind," for me to assist the ship.

Q. 33. Where was Captain Joseph Lewis when he gave you these orders?

A. If I remember right, he was on the deck of the lighter Salvor.

Q. 34. Did you do what he told you to?

A. I started to go for the Salvor, but he countermanded the order so quick that I didn't get much chance to do anything.

Q. 35. Then what happened?

A. Why, being that the Hazleton was a slow handling boat, I had to let the ship go by me before I could turn around and head the same way the ship was headed.

Q. 36. You were headed how?

A. We were headed west and the ship was headed east.

Q. 37. Then did you follow along after?

A. Yes, sir.

Q. 38. How did she act after she went off, in the way of sheering?

A. Looked to me as if she was doing nothing but sheering from one side to the other.

Q. 39. From the time she went off up to the time she hit?

A. Well, she might have gone twice her own length straight.

Q. 40. And the sheers began, you think, after she had not gone further than twice her own length?

A. I don't think she had gone much further than twice her own length.

Q. 41. Did you catch up to her?

A. Yes, sir.

Q. 42. At what point?

A. Well, just about—this side of the ferry; just about a thousand feet this side of the ferry.

Q. 43. And in relation to where she struck, how long before she struck did you catch up to her?

A. About three thousand feet.

Q. 44. Were you able to assist her at all from the time you caught up to her until she struck?

A. I would have been of some assistance to try to keep her straight if I had had anybody to take lines from me.

Q. 45. Anybody on the ship, you mean?

A. On the ship,—to take lines.

281 Q. 46. Tell us what happened in that respect.

A. I would have gone up on the ship, well up on her quarter; and the deckhand had my orders to put a line out.

Q. 47. Your own deckhand?

A. Yes, sir. And I called to two men I saw on deck there,—I don't know whether they were firemen or deckhands or what they were, on deck, to take that line. They paid no attention to me,—nobody took the line. The consequence was that my line was of no use.

Q. 48. Did you see Captain Hammett at that time,—was he on the Bay Port?

A. He was on the bridge of the ship; yes, sir.

Q. 49. Did you hear him give any orders about taking your line?

A. No, sir, I didn't. There was steam blowing there and the rattle of the steering engine,—my steering engine, to drown anything unless they hollered.

Q. 50. In any event, your line was not taken?

A. No, sir.

Q. 51. And you did not give the ship any assistance until she struck?

A. No, sir.

Q. 52. How far do you think she went from the time she floated up to the time she struck,—how long a distance was that, captain?

A. Oh, about a mile.

Q. 53. When the ship went off, did you hear Joseph Lewis say anything to pilot Lewis,—that is, William Lewis?

A. Why, if I remember right, I think Lewis the pilot said something about Sandwich dolphins; and Captain Joe Lewis answered, "That would be a good place."

Q. 54. Can you give us that again a little more completely? I do not expect you to give us the exact words, but the substance of it.

A. Why, Captain William T. Lewis suggested the dolphins at Sandwich.

Q. 5. Suggested them in what respect?

A. Why, I took it that he wanted to know if that was satisfactory to Captain Joe Lewis.

Q. 56. Satisfactory for what,—not to eat?

A. No, but to moor the ship and handle her there.

Q. 57. What did Joe Lewis say in reply to that?

A. He said that would be all right.

282 Cross-examination.

(By Mr. Park:)

X Q. 58. After you had towed the Salvor from Sandwich back to the ship, where did you make the Salvor fast?

A. About abreast of No. 4 hatch.

X Q. 59. And did you make the Hazleton fast at that time?

A. To the bow of the ship; yes.

X Q. 60. Were you alongside of the Salvor, made fast on the outside of the Salvor?

A. No, sir; I dropped away from the Salvor to the bow of the ship.

X Q. 61. What boat was alongside of the Salvor, if any?

A. There wasn't any.

X Q. 62. Where was the John C. Stuart?

A. She was on the quarter, out ahead of the Salvor.

X Q. 63. And, if I understand you correctly, your recollection of it is that the Dalzelline and the Hazleton were up on the port bow of the ship?

A. Yes, sir.

X Q. 64. One tug outside of the other?

A. Yes, sir.

X Q. 65. Then came the Salvor, about amidships of the Bay Port?

A. Yes, about amidships.

X Q. 66. And then ahead of the Salvor, up on the port quarter of the Bay Port, was the John C. Stuart?

A. Yes.

X Q. 67. And all the tugs were heading to the westward?

A. Yes, sir.

X Q. 68. When the vessel came off, I understand you that Captain Joseph Lewis told you to look out for the Salvor, to cast off her lines,—or what was it?

A. He told me to take the Salvor away from the ship.

X Q. 69. To take her away from the ship. Did you do it?

A. I didn't have a chance to do it.

X Q. 70. Do you know how she was taken away from the ship?

A. The John C. Stuart, I suppose.

X Q. 71. And you heard some talk between the two Lewises as to the dolphins down at Sandwich?

A. Yes, sir.

X Q. 72. You understood by that, when they got down there they should tie her up there?

A. Tie her up there; yes.

283 X Q. 73. Did you know about the operations that had been going on up on the starboard side of that ship while she lay there stranded?

A. No, sir.

X Q. 74. You did not go there to look at it?

A. No, sir.

X Q. 75. You knew there was a diver working?

A. Yes, sir; I saw the diver's pump working.

X Q. 76. You saw the diver's pump working?

A. Yes.

X Q. 77. That is all you knew about it as far as anything that occurred previous to the time the ship came off?

A. Yes, sir.

X Q. 78. Did you see anybody alongside of Captain Joe Lewis on the Salvor at the time this conversation took place?

A. Not that I can remember. There was quite a few on the Salvor there of her crew.

X Q. 79. Four or five or half a dozen right there all together, were there not?

A. I should judge there was ten men on the Salvor easy.

(By Mr. Blodgett:)

X Q. 80. You got your orders to go there, I understand, from the Canal Company?

A. I got it from the collector.

X Q. 81. He is an employee of the Canal Company?

A. Yes, as far as I know.

X Q. 82. Did you have any knowledge of any shoal spot in the canal prior to this accident?

A. No, sir.

X Q. 83. Not at all?

A. No, sir.

X Q. 84. Had you examined the blueprints in the company's office?

A. No, sir.

X Q. 85. At any time?

A. No, sir.

X Q. 86. Had Captain Geer or anyone given you any information in reference to shoals that they knew existed?

A. No, sir; I don't remember of any instructions.

X Q. 87. So that you thought there was 25 feet of water throughout the canal?

A. Yes, sir.

X Q. 88. And I suppose if there was 25 feet of water, in your judgment it was safe and prudent to take a vessel drawing 18 feet through?

A. Yes,—18?

X Q. 89. Yes.

A. Yes.

284 X Q. 90. Or 18 feet, 2 or 3?

A. Yes, sir.

X Q. 91. And I suppose up to 19 feet they would go through safely, if there were 25 feet of water at mean low water?

A. Why, according to the ship's handling.

X Q. 92. What?

A. It is according to what kind of a ship she is to handle.

X Q. 93. Did you ever have any experience with these pigs?

A. No, sir.

X Q. 94. If there is not water enough under a ship she won't handle so well,—she won't handle right, will she?

A. No, sir.

X Q. 95. And the effect of that is shown in sheering?

A. Yes, sir.

X Q. 96. And if a vessel sheers with a head tide it is harder to break than it is in still water?

A. Why, it is,—yes.

X Q. 97. In other words, the best time to take a deep-laden vessel through the canal was at still water?

A. No.

X Q. 98. At dead high water,—that was the best time, was it not?

A. Well, that is really the best time; yes, sir.

X Q. 99. Yes, and the nearest you can get to that is the best you can get?

A. Yes, sir.

Mr. Blodgett: I think that is all.

Mr. Pillsbury: That is all.

ABE SMITH (sworn).

(By Mr. Pillsbury:)

Q. 1. What is your name, Captain Smith?

A. Abe Smith.

Q. 2. Where do you live?

A. New York City.

Q. 3. What is your occupation?

A. Captain of steam vessels.

Q. 4. Captain of steam vessels. In December, 1916, what was your occupation?

A. Captain of the tugboat John C. Stuart.

Q. 5. Day captain?

A. Day captain.

Q. 6. Did you see the Bay Port on the first day that we have been talking about?

A. Yes, sir.

Q. 7. Where?

A. See her on the south bank, Cape Cod Canal.

Q. 8. After she had struck?

A. Yes, sir.

Q. 9. What time did you get there?

A. Around 2 o'clock in the afternoon, I guess; I don't
285 know for sure the exact time; it was around 2 o'clock in the afternoon.

Q. 10. And how late did you stay?

A. Until half-past six in the evening.

Q. 11. The other witnesses have described what took place. Is there anything that you want to add to their evidence about that?

A. No.

Q. 12. That is, you stood by during that period?

A. I stood by her there until we changed crews that night, half-past six, then I went to Buzzard's Bay.

Q. 13. Captain Joe Lewis had not come at the time you left?

A. I hadn't seen him.

Q. 14. When did you next see the boat?

A. Half-past six or quarter of seven the next morning.

Q. 15. What was the condition of affairs then?

A. She laid alongside of the steamer where I left her.

Q. 16. No change as far as you could see?

A. No, sir.

Q. 17. What work was going on?

A. What is that?

Q. 18. What work was going on; what was being done?

A. There wasn't nothing being done, when I got there.

Q. 19. How soon after you got there was any work begun in the way of pumping or lightering the coal or anything else?

A. Well, I don't know about pumping; I heard them say there that the pumps had been working during the night, and was still working.

Q. 20. Did you see the coal lightered?

A. I see them take some out of her; a very little.

Q. 21. Did you see Captain Joe Lewis that day?

A. The next day; yes, sir, I see him around there.

Q. 22. What was he doing?

A. He was giving orders to different men on the wrecking boat.

Q. 23. You were there when she floated?

A. Yes, sir.

Q. 24. What was the position of your tug when she floated?

A. She was made fast to the lighter Salvor on the port side of the steamer, headed west.

Q. 25. Made fast to the Salvor?

A. Made fast to the Salvor.

Q. 26. You noticed the ship when she floated, and how long could you see her; that is, did you see her strike the second time?

A. No, sir.

Q. 27. Just describe what you noticed about the ship when she went off and after she went off.

A. Well, all I know is, sir, I heard them holler "There she goes," and somebody hollered "Let go the Salvor and run ahead of her," so I got a hawser on the Salvor, and I threwed her line off; the Bay Port went on down the canal, and I went up the canal.

Q. 28. Did you notice what the trim of the Bay Port was?

A. As near as I could see from where I was, she had a port list on her, and she was down at the bow.

Q. 29. Port list and down at the bow. Did you see her sheer?

A. No, sir, I didn't see her sheer.

Q. 30. Did you observe anything about her?

A. No, sir; not after she went by me I didn't. I had all I could do to take care of the Salvor and the hawser.

Q. 31. You did not look at her after she went by?

A. I didn't notice her.

Cross-examination.

(By Mr. Park:)

X Q. 32. After the Bay Port came off the bank, what orders were given you by Captain Lewis as to what you should do with the Stuart?

A. Captain Lewis told me to get a hawser on the Salvor, and he says, "Kind of straighten her stern up there a little bit."

X Q. 33. That is, straighten the stern of the Bay Port up?

A. Yes, "and then throw the line off the stern." And I went off to her, and the Bay Port went down the canal.

X Q. 34. Did you straighten up her stern?

A. I don't know whether I straightened it up or not. I ran alongside of her.

X Q. 35. Were your engines going?

A. Engines going.

X Q. 36. And at that time did you have a hawser to the Bay Port?

A. I had a hawser on the Salvor.

X Q. 37. Did you have any hawser at all at that time on the Bay Port?

A. No, sir.

X Q. 38. Just tell us how you straightened up the stern of
287 the Bay Port.

A. She kind of canted off, and I ran alongside of her with my boat; ran head on to her.

X Q. 39. Did you go ahead on your engines?

A. They had been working ahead until I got clear of the hawser, until I got the hawser out.

X Q. 40. But you did change the position of the stern of the Bay Port?

A. I won't say I did. I might have. I don't know whether I did or not; I didn't notice; I was looking after the Salvor and looking after the lines.

X Q. 41. You did that under the orders of the pilot, William Lewis, who was on the Bay Port?

A. Yes, sir.

X Q. 42. And afterwards he told you to take the Salvor and follow him down?

A. He told me to take the Salvor away.

X Q. 43. And you did it?

A. I did it.

(By Mr. Blodgett:)

X Q. 44. Captain, did you know of the existence of any shoal spot or bad place in the canal shortly to the westward of where you saw this Bay Port ashore?

A. No, sir.

X Q. 45. Had you ever been instructed in reference to any shoal spot along there?

A. No, sir.

X Q. 46. Had you ever been instructed in reference to any difficulty in steering at that locality?

A. No, sir; never had any.

X Q. 47. Had you been told of a shoal spot up where the Trilby was lying?

A. No, sir; I was never informed of that.

X Q. 48. So that, as far as you knew from the Canal Company, the canal had 25 feet depth of water at mean low water all through?

A. As far as I know. I had never had any instructions any different.

Mr. Blodgett: That is all.

Mr. Pillsbury: That is all, captain.

WILLIAM S. CROCKER (sworn).

(By Mr. Pillsbury:)

Q. 1. Mr. Crocker, what is your name?

A. William S. Crocker.

Q. 2. Your occupation?

A. Civil engineer.

Q. 3. You live where?

A. Walpole, Massachusetts.

Q. 4. You were formerly an engineer on the canal and in the employ of the Canal Company?

A. Yes, sir.

288 Q. 5. When did you leave the service of the Canal Company?

A. Last April.

Q. 6. You were in the employ of the Canal Company at the time of this accident?

A. Yes, sir.

Q. 7. And some time before it and some time after it?

A. Yes.

Q. 8. Did you have to do with soundings in the canal, from which you made plans and charts showing the depth of water at various spots?

A. Yes, sir.

Q. 9. How long before the 13th of December, 1916, had you made any soundings?

A. We were making soundings almost every day whenever the weather permitted.

Q. 10. Will you tell me what the depth of water was at station 230, and you may use any data or plans which you wish to [passing the witness a plan]?

A. This plan was not made by me.

Q. 11. Oh, wasn't it?

A. No, sir; it was made after I left.

Q. 12. Then we do not want to use that. Was this blueprint made by you, Mr. Crocker [passing the witness a blueprint]?

A. Yes, sir.

Q. 13. When was that made?

A. The blueprint white line was made by soundings of June 1st, 1916; and the pencil by soundings of February 12, 1917, and February 13, 1917.

Q. 14. That plan, then, shows two sets of soundings made in June previous to the accident, and soundings made two months after it?

A. It really shows three sets of soundings.

Q. 15. Three sets; two sets being about a couple of months after the accident and one set in the June before?

A. No; it shows soundings of June 1st, 1916; those were taken on the center line of the canal; and also shows soundings of February 12, 1917, and soundings of February 13, 1917, the day after.

Q. 16. I think that was what I said, was it not? It does not make any difference.

A. It may be.

Q. 17. At any rate, the soundings were in June, 1916, and February, 1917?

A. Yes, sir.

Q. 18. Can you tell me, from that, what the depth of water was at this station 230 on all of those dates?

289 A. About 30 feet on June 1st, 1916. That was shown by soundings taken on the centre line of the canal.

Q. 19. And what was it in February of 1917?

A. About the same.

Q. 20. There was no change?

A. No, sir.

Q. 21. Now, will you give me the soundings westward of that station as you show them on the plan and tell me roughly the distances that you are talking about; that is, working about a thousand feet west and giving me the soundings?

A. From station 230 to station 240 there are no soundings that show less than 28 feet at mean low water.

Q. 22. How long a distance is that?

A. A thousand feet.

Q. 23. A thousand feet?

A. Yes. At station 242, that is, 200 feet——

Q. 24. Just a moment. Perhaps before I go on any further, here is another blueprint; is that of any assistance to you, with this? You made that one, too, did you not?

A. Yes, sir.

Q. 25. Do you want to use that, or is the other one better?

A. These soundings were made for different purposes.

Q. 26. Is it of any assistance to you, in answering the question, to have this second blueprint?

A. No, sir.

Q. 27. That is, that profile one is all you want?

A. I think it is sufficient for this.

Q. 28. Now, I may have interrupted you. I think you said that was a distance of a thousand feet,—and the soundings were not less than what?

A. Not less than 28 feet below mean low water. Station 242 is approximately the same.

Q. 29. What is that distance?

A. That is 200 feet further to the westward.

Q. 30. That would be a total of 1,200 feet?

A. Station 241,—station 243 shows about 20 feet at mean low water.

Q. 31. Now, that was the nearest shoal to the point of the accident, was it not?

A. Yes, sir; it was the nearest one that we found.

Q. 32. Just give the soundings, still going westward there, if that would be of any help to us.

290 A. Then we found soundings of over 25 feet below low water to station 247, and there we found soundings of about 20 feet.

Q. 33. What distance is that from the place where she struck?

Mr. Blodgett: What number was that?

The Witness: Station 247.

Q. 34. That would be how far away from where she struck?

A. That would be how far from what?

Q. 35. From where she struck.

A. From where she struck?

Q. 36. Yes.

A. Her bow was at station 230, and that would be 1,700 feet west of the bow.

Q. 37. Now, will you take the station where she struck the second time, which I believe is station 193, is it not? Does that blueprint show that station?

A. Yes, sir.

Q. 38. Tell me the depth of water there.

A. The depth of water at 193 was about 24 feet, and then to the westward, beginning at that station, it shoaled up to about 21 feet.

Q. 39. I am afraid I confused this, because I made a mistake in the station where she struck. I thought it was 193, and I am told it was station 169. I will ask you, Mr. Crocker, the depth of the water at station 169?

A. 169 shows about 27 feet.

Q. 40. Now, working westward from that point for a thousand or 1,200 feet, will you give me your soundings?

[The witness, misunderstanding the question, gives the soundings eastward from station 169, instead of westward, and therefore the questions and answers relating to those soundings are stricken out.]

Q. 41. Mr. Crocker, we have struck out your answer because of a misunderstanding. What were your soundings from station 169 westward for a thousand or 1,200 feet, that is, towards Buzzard's Bay?

A. From station 169 westward?

Q. 42. Yes.

A. The profile shows from station 169 to about station 180—

Q. 43. Each station is 100 feet, is it not?

A. Yes, sir. —at least 26 feet of water and considerably more in most stations. From station 180—do you want me to continue to the westward?

Q. 44. Let me see. What distance have you covered now?

A. A thousand feet or 1,100 feet.

291 Q. 45. All right. Go ahead a little further.

A. To station 188 it shows more than 26 feet of water, that being the profile of June 1, 1916.

Q. 46. Is it the same for the profile of February, 1917?

A. No, sir.

Q. 47. What does that show?

A. At station 169 it shows only about 21 feet of water.

Q. 48. At station what?

A. 169.

Q. 49. Now, working from that westward in the same way as you did with the other, what does it show?

A. It shows one very evident change at station 172,—there is about 24 feet of water.

Q. 50. Twenty-four. Now cover the rest of the territory. What is the depth?

A. The rest is all over 26.

Q. 51. The rest is all over 26 feet?

A. Up to station 186.

Q. 52. That change there that you spoke of, do you connect that with the Bay Port having been in the canal there?

A. Undoubtedly.

Q. 53. That is, that would cause the shoal, would it?

A. Yes, sir.

Q. 54. Now, can you tell me in general,—well, I will ask you, first, whether there is any shoal in the canal at or near the railroad bridge?

A. I haven't the soundings with me, but I do not remember any at that time.

Q. 55. These soundings were made for the purpose of ascertaining if there were any shoals, were they not?

A. Yes, sir.

Q. 56. And when you found the shoals, you noted them?

A. Yes, sir.

Q. 57. So if there had been a shoal at or near the railroad bridge you would have some record of it, would you not?

A. Yes, sir.

Q. 58. Now, as to the Bourne bridge, near the bridge was there any shoal?

A. No, sir.

Q. 59. Was there any shoal from the Bourne bridge up to the first shoal you have mentioned going westward, namely, 242 and 243?

A. Well, I think there was another one around 250.

Q. 60. Have you got any record of that?

A. This plan shows about 22 feet of water at station 250.

Q. 61. Well, then, perhaps you had better give me some more soundings there in that vicinity.

A. I think that is the last I have.

292 Q. 62. How extensive a shoal was it; what are the soundings on either side of it?

A. All of these shoals were small in area.

Q. 63. How large were they?

A. I think none of them were over 150 feet long, lengthwise of the canal.

Q. 64. Well, then, with the exception of this last shoal, was there any shoal from the railroad bridge to the shoal at 242?

A. I do not remember any; and if they were, there is a record of them.

Q. 65. All deep water?

A. Yes, sir.

Mr. Blodgett: He just mentioned one at 250.

Mr. Pillsbury: I said with that exception.

The Witness: There may have been one just—another one just west of 250. I don't remember about that. If there is, there is a plan of it.

Mr. Pillsbury: Well, is there any plan showing anything, Mr. Mahony?

Mr. Mahony: Just at 250.

Mrs. Pillsbury: Let me show him that 250 plan.

Q. 66. [Passing the plan to the witness.] I am informed that this plan is the only other plan that is in the files, Mr. Crocker. That is the 250 shoal that you mention. Do you think there is anything else?

A. I think not; I think that was the last one to the westward between this point and the Buzzard's Bay railroad bridge.

Q. 67. Are you familiar with the construction of the canal at the point where the Bay Port first struck, namely, station 230?

A. Yes, sir.

Q. 68. You have heard a so-called "knuckle" referred to here in evidence. Did you ever hear of a knuckle,—did you ever hear that term?

A. Yes, sir.

Q. 69. What is the meaning of the word?

A. I suppose it would mean a projection.

Q. 70. What sort of a projection?

A. Projection of the land, in this particular case, into the canal.

Q. 71. Now, what was the condition, so far as the prism of the canal is concerned, as to any projection into it at this point?

A. The top surface down to—in some cases—

293 Q. 72. You notice, Mr. Crocker, that my first question was about the prism. By that, I mean the 100-foot channel.

A. The 100-foot channel?

Q. 73. Yes; was there any projection into that 100-foot channel?

A. Not that I know of; no, sir.

Q. 74. Now, was there any projection of any sort at the top of the slope, from the bank?

A. Yes, sir; I think there was.

Q. 75. Just tell us what that was, how big it was.

A. Well, it was not very large. I don't know just how far it projected into the surface of the water, but it did not go down below the—far below the surface of the water.

Q. 76. How far down did it go below the surface?

A. I don't know, but certainly not very far.

Q. 77. Well, you see we do not know what you mean by "very far". You will have to put it in terms of feet.

A. Well, in my opinion, it did not go 10 feet below low water.

Q. 78. That is, it was a purely surface proposition, was it?

A. Yes, sir,—and probably not as much as 10 feet.

Q. 79. You, of course, have worked around that locality a great deal, off and on?

A. Yes, sir.

Q. 80. Have you noticed any swirl or unusual current at that point?

A. No more than any other place.

Q. 81. That is, the whole canal had currents in it, I suppose, at various places?

A. Swirls may be seen almost anywhere.

Q. 82. It is a very narrow waterway with a swift current, is it not, with the tide running?

A. Yes, sir.

Q. 83. And the current will produce cross-currents and so-called "swirls" in very many places, won't it?

A. I don't think there are very many cross-currents in the canal. Observations from buoys and from drifting through in a boat, which I have done a great many times, would not show many, because you drift along in a very true line. As for the swirls, they do appear on the surface, you can see them, but I should not call them cross-currents.

Q. 84. I did not distinguish as I should between a swirl and a cross-current. Just what is a swirl?

A. Well, in my opinion, in this case it would be an appearance of the water going around in a circle.

294 The Court: An eddy, is it not?

The Witness: An eddy; yes, sir.

Q. 85. Well, that would be surface water, would it not?

A. How far those go down, I don't know. They certainly have very little effect on a buoy.

Q. 86. Have you, as a matter of fact, tried this particular locality with buoys to see what effect it had?

A. Not to note the effect, but I have used buoys there.

Q. 87. You have used buoys there?

A. Yes.

Q. 88. So in that way you would know the effect. Now tell us the effect, if any, of the swirl that existed at this point.

A. There is no apparent deflection from the shore as the buoys go by this point,—either a buoy or a boat; that is, a boat with a sounding rod in it,—a man using a sounding rod from it, or a man using a sweep from it.

Q. 89. Now, was that so-called “knuckle” which you have described sufficient to cause any swirl which would interfere with navigation?

Mr. Blodgett: He is not a navigator. He is a constructor of canals. He can tell what he sees.

The Court: Yes, he may answer that question.

A. I cannot see how it could in any way.

Q. 90. There was, however, on the surface of the water at this point, as well as other points, the appearance of an eddy?

A. Yes, sir.

Q. 91. And that, I suppose, as you have already stated, you find in a great many places in the canal, from various causes. What would account for them, do you know?

A. You see them in almost all running water that is not running very fast.

Q. 92. That is, you see them not only in the canal but in other running waters, do you?

A. Certainly.

Q. 93. And do you know what causes them?

A. I suppose it may be friction. I am not sure of that. It may be friction of the water on the banks.

Q. 94. Was there any change made or any change that

295 took place at the bank at station 230 while you were there?

A. You mean since the accident to the Bay Port?

Q. 95. Yes.

A. No.

Mr. Pillsbury: That is all.

Mr. Park: No questions.

Cross-examination.

(By Mr. Blodgett:)

X Q. 96. Did you say you were a hydraulic engineer or——

A. Civil engineer.

X Q. 97. Civil engineer. Now, Mr. Crocker, you, as I understand, had charge of the surveying of the bottom of this canal and seeing that it was done?

A. Yes, sir.

X Q. 98. And in the course of your duty you made soundings practically all the time and had blueprints of them in the office?

A. Yes, sir.

X Q. 99. And reported the result of your work to Mr. Geer and Commodore Miller, or either of them, did you?

A. To Captain Geer; yes, sir.

X Q. 100. And Commodore Miller?

A. Not formally to Commodore Miller.

X Q. 101. Not ordinarily?

A. Not ordinarily.

X Q. 102. At times you did, when he was there, I suppose?

A. I talked conditions over with him; yes, sir.

X Q. 103. He was the vice-president of the company?

A. Yes, sir.

X Q. 104. And he has lately died?

A. Yes, sir.

X Q. 105. And Captain Joe Lewis is also dead?

A. Yes, sir.

Mr. Pillsbury: When did he die?

Mr. Blodgett: Last summer, the last part of August or first of September.

X Q. 106. That is right, is it not, Mr. Crocker?

A. I believe so, as I remember it.

X Q. 107. According to your memory?

A. Yes, sir.

X Q. 108. Now, in June, 1916, you had been making certain soundings in the course of your work, and you found two distinct shoal places in the canal, did you not,—shoal spots—

A. Yes, sir.

296 X Q. 109. —where there was less than 20 feet of water?

A. Yes, sir.

X Q. 110. And one of those shoal spots was between 241 and 242, was it not?

A. This profile shows it at 243, but that might be a little in error.

X Q. 111. In other words, you have been testifying from a profile and not from the blueprints which you made showing the centre line dips?

A. I have been testifying from a profile which was drawn up to show the soundings that were taken through the canal for the purpose of finding shoal spots in the canal.

X Q. 112. Yes. And as you say now that does not accurately place the shoal spots?

A. It might be a little out of place; yes, sir.

X Q. 113. Well, now, I will show you this blueprint and ask you if that is one of the blueprints which you made or had made from your soundings that were taken in June?

A. No, sir.

X Q. 114. It was not?

A. No, sir.

X Q. 115. That was taken November 20th, 1916?

A. Yes.

X Q. 116. And you found then a distinct shoal between 241 and 242?

A. Yes, sir.

X Q. 117. Showing from 19 to 20 to 22,—26,—29 feet?

A. Yes, sir; 19.3 is the shoalest.

X Q. 118. And that shoal extends up into 242,—243?

A. Toward the south bank; yes.

X Q. 119. Toward the south bank. This blueprint shows the bottom section of the canal?

A. Yes, sir.

X Q. 120. Between those white lines?

A. Yes.

X Q. 121. That is, that is the 100-foot width bottom section?

A. Yes, sir.

X Q. 122. And the marks you have got here do not attempt to place all the soundings which you made?

A. No, sir.

X Q. 123. What did you attempt to place?

A. To show the difference in depth of the water and the shoals.

X Q. 124. Now, between stations 241 and 242 you have all your figures on the centre line of the prism of the canal, the 100-foot depth?

A. Yes, sir.

297 X Q. 125. What does it show on either side of that?

A. It shows no figures on either side of that.

X Q. 126. What does that show to you as to the conditions on either side of that, in that section,—in that station?

A. From the blueprint, it shows me nothing.

X Q. 127. Well, from your memory,—why didn't you put the other figures in, in other words, on that blueprint, from memory?

A. Because this was enough to answer the purposes. I have other plans probably which show this; at any rate, soundings were taken to show this. But this showed that there was 19.3 at this point and it was sufficient for us to know how to take care of that shoal.

X Q. 128. In other words, the intention was that you would go on to that shoal and dredge it down?

A. In case I had to do that, I knew how to handle it.

X Q. 129. And that was on file in your office after November 20, 1916,—on November 21st or within a day or two after that?

A. Yes, sir.

X Q. 130. And was reported to Captain Geer?

A. Yes, sir.

X Q. 131. And do you remember seeing Commodore Miller after that and before the accident and talking with him about it?

A. No, sir, I don't remember it.

X Q. 132. You don't remember whether you did or not?

A. No, sir.

X Q. 133. But it was reported to the superintendent of the Canal Company?

A. Yes, sir.

X Q. 134. Did you give any notice to the tugboat captains or the pilots in reference to anything of this kind, or did you just give notice to your office?

A. I just gave notice to Captain Geer.

X Q. 135. To Captain Geer. And the tugboat captains and pilots

were expected to go to the Canal Company to get any information they wanted?

Mr. Pillsbury: That I object to.

Mr. Blodgett: All right, strike it out.

X Q. 136. You did not have any instructions to give them any notice?

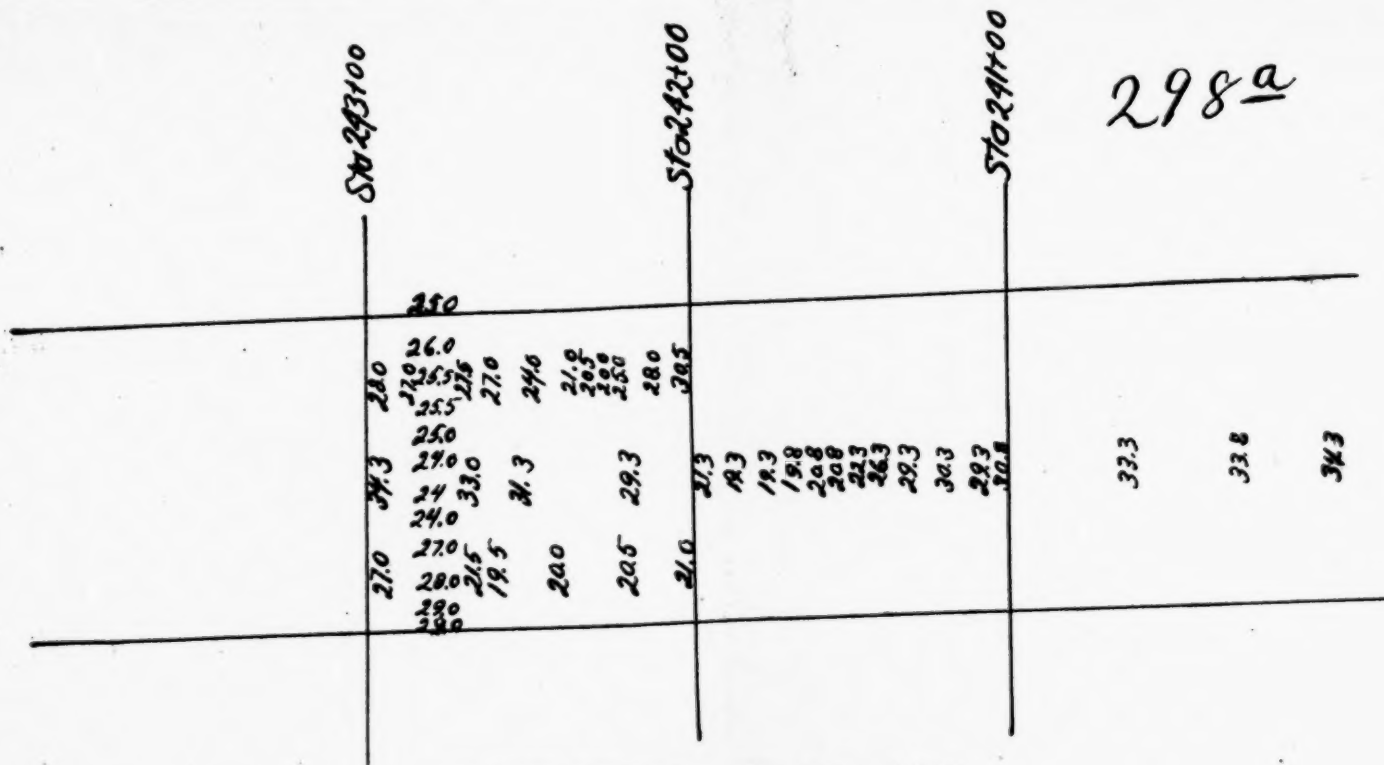
A. I think not; no, sir.

298 Mr. Blodgett: I will ask to have this marked. Were you going to mark your plan, Mr. Pillsbury?

Mr. Pillsbury: Yes; I think we had better mark them both.

[Mr. Pillsbury's plan is marked as "Canal Company Exhibit 2," and Mr. Blodgett's is marked as "Bay Port Exhibit 1."]

(Here follow diagrams marked pages 298a, b, and c.)



BAY PORT EXHIBIT 1, Cases 1517 and 1518.
(Put in Evidence, page 298.)

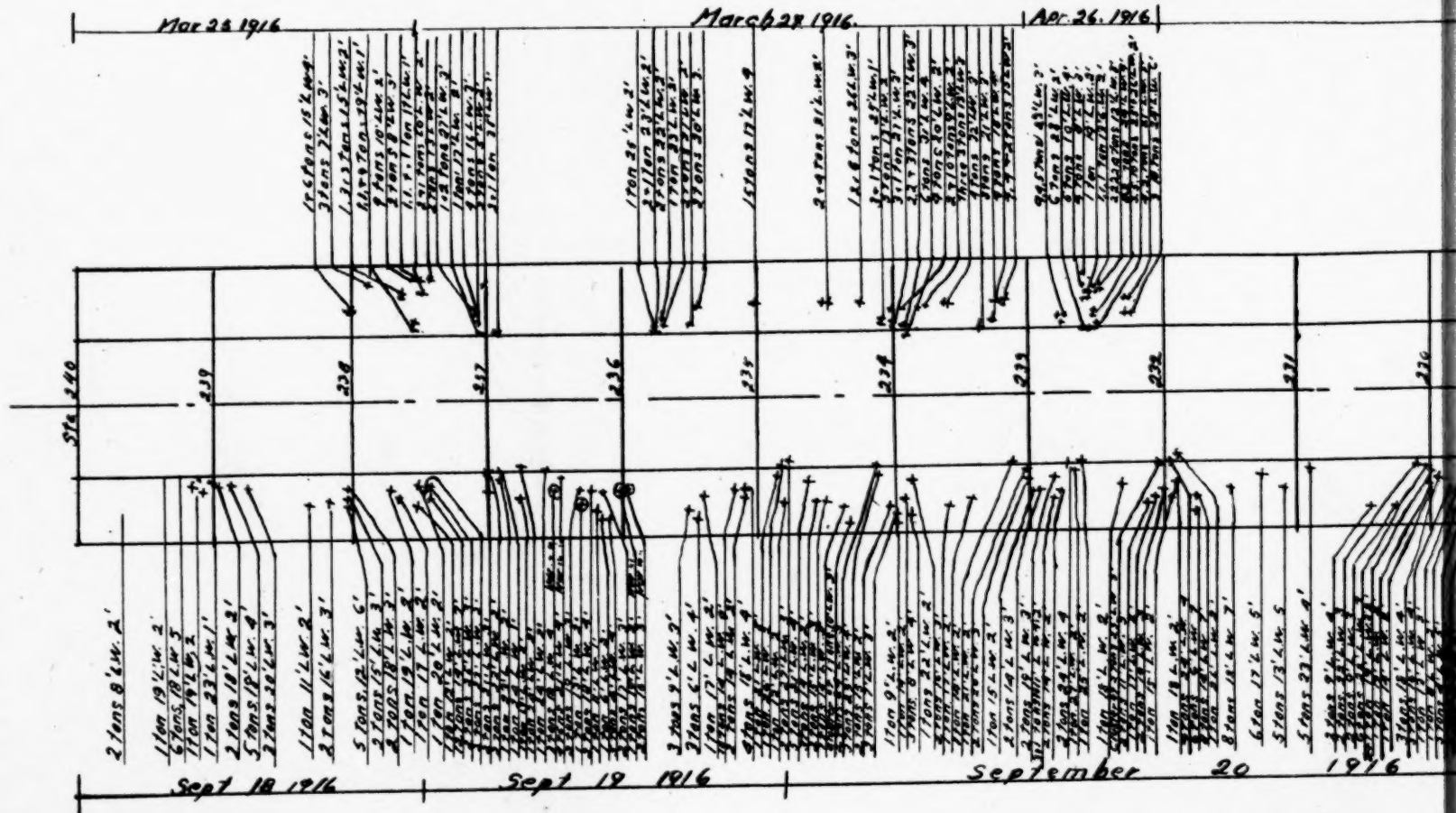
Sketch Showing Soundings
Near

Sta 243+00

467
No. 467
W.O.T.C. } p 29
" Bee my Co.)

Depths at mean Low water - By soundings of Nov. 20, 1916
Scale - 1" = 50'

DATES OF INVESTIGATION BY DIV



No 467
W.O.T. Co } p. 298^b
Canal Co.

Notes

Sketch shows
'LW' signifies
Mean Low

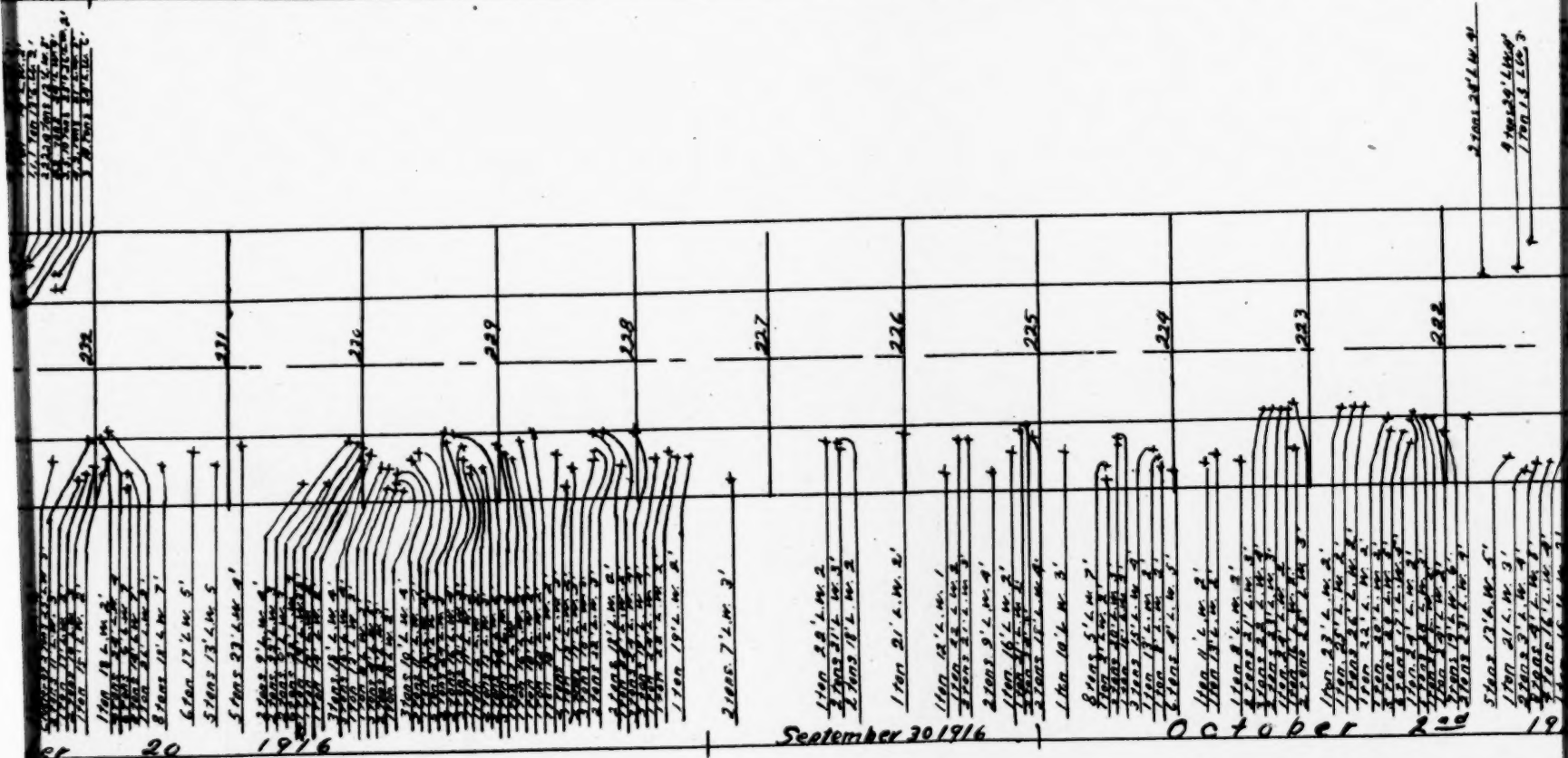
BAY PORT EXHIBIT 2, Cases 1517 and 1518.
(Put in Evidence, page 299.)

(Put in Evidence, page 299.)

INVESTIGATION BY DIVER.

26. 1946

April

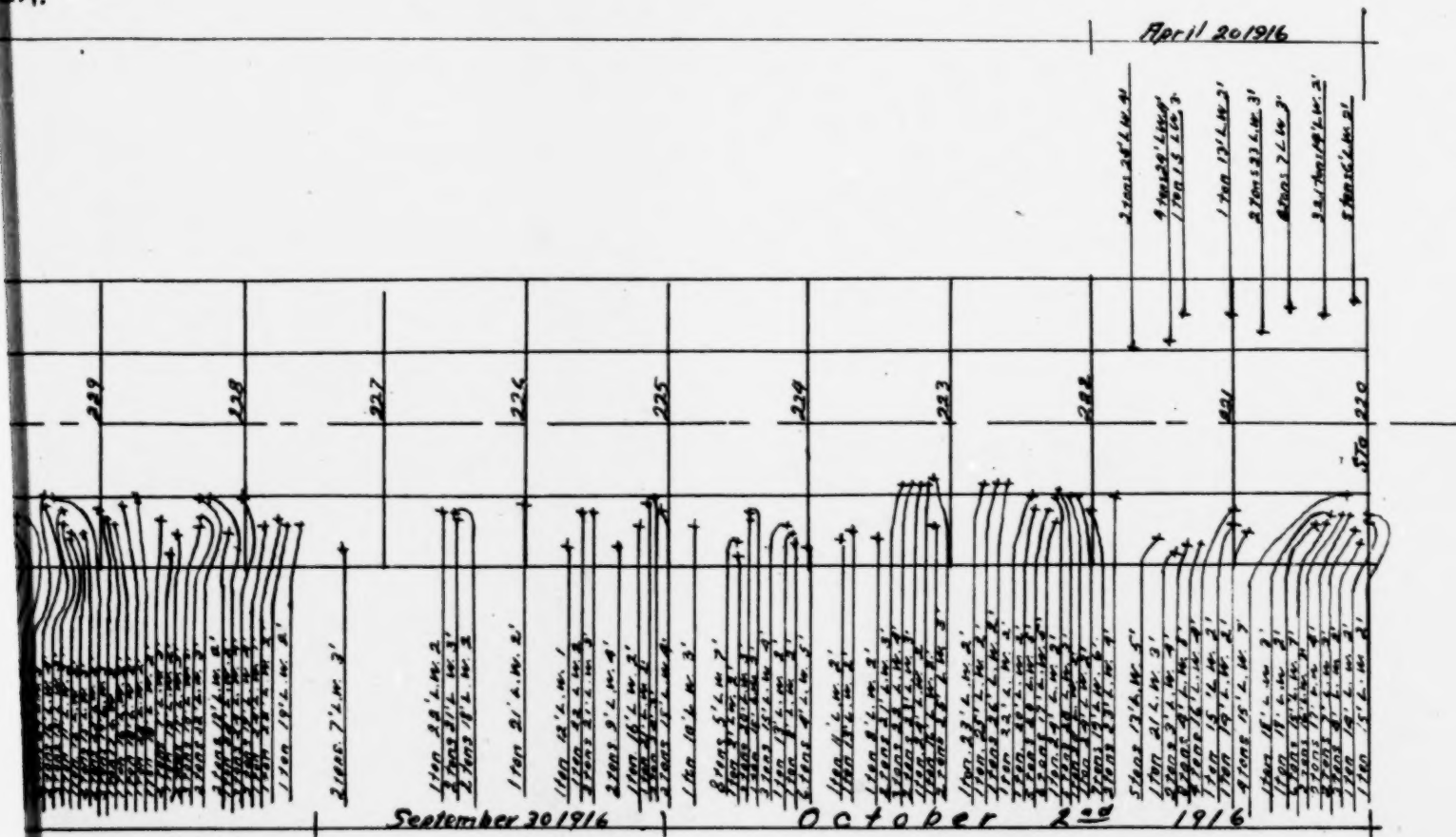


Notes

Sketch shows approximate location of boulder.
'LW' signifies depth of water on boulder at
Mean Low Water.

CAPE COD CONSTRA
CAPE COD CANE
SKETCH SHOW
BOULDERS ON THE
Scale 1 inch = 10

VER.



remote location of boulders.
Hot water on boulder at

CAPE COD CONSTRUCTION CO.
CAPE COD CANAL
SKETCH SHOWING
BOULDERS ON THE SLOPES.
Scale 1 inch = 100 feet.

CANAL COMPANY EXHIBIT

(Put in Evidence)

75

70

65

ELEVATIONS - ϕ - CAPE COD CANAL

Scale Hor - 1 in = 1000 ft.

Ver - 1 in = 5 ft

Soundings ϕ of June 1, 1916 60

210

200

230

220

210

200

190

180

170

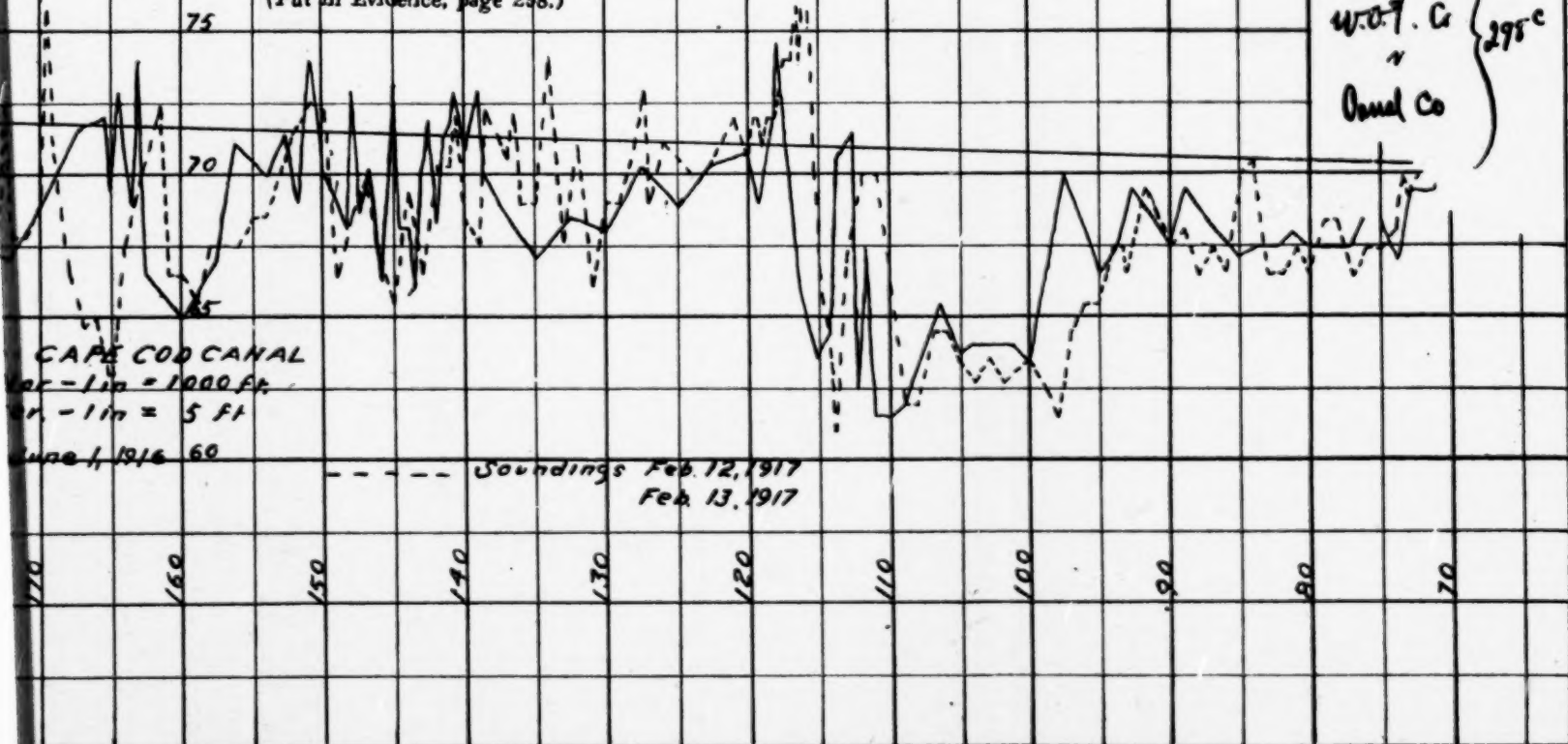
160

150

CANAL COMPANY EXHIBIT 2, Cases 1617 and 1618.

(Put in Evidence, page 298.)

No 467
W.O.F. Co } 295c
Canal Co }





X Q. 137. Well, now, at what station was the knuckle, so called, that we have been talking about, Mr. Crocker?

A. It was near 230. I do not remember the exact station. It was between 230 and 235.

X Q. 138. Between 230 and 235. And when the Bay Port was ashore the first day, you went down and saw her,—the first afternoon?

A. Yes, sir.

X Q. 139. You went to her and saw her ashore?

A. Yes, sir.

X Q. 140. And you marked where her head was by what station?

A. 230.

X Q. 141. 230. Are you sure of that? You made a drawing on a diagram, did you not, in pencil on a plan, locating her?

A. I believe so.

Mr. Blodgett: Have you got that plan showing the Bay Port?

Mr. Pillsbury: Was that a white paper plan?

Mr. Blodgett: No; it was a blueprint.

Mr. Pillsbury [to the witness]: Do you mind telling me whether that was on white paper?

The Witness: I think I put it on both a white paper and a blueprint, but I don't remember.

Mr. Blodgett: You produced a blueprint to me the other day.

Mr. Pillsbury: I have produced all my plans to you, and you have been rummaging through them for days.

Mr. Blodgett: Excuse me, I have not seen your files. I saw your blueprints.

[A blueprint is produced.]

X Q. 142. Is this one of the plans, one of the blueprints, that I asked you about as to where you put the Bay Port?

A. I think I put that on there.

X Q. 143. And that pencil mark is what?

A. Her approximate position.

299 X Q. 144. Her approximate position. And, according to that, her bow is approximately 230, and her stern is approximately 233?

A. Yes, sir.

X Q. 145. As you went down there that day, did you see the knuckle?

A. Not to notice it; no, sir.

X Q. 146. To notice whether it was astern of her or abreast of her?

A. Not to notice it; no, sir.

X Q. 147. It was about in that locality, was it not?

A. It was in that locality. I saw the boat from the opposite shore.

X Q. 148. From the opposite shore. Well, she was on the opposite shore from the knuckle?

A. Yes, sir.

X Q. 149. So you saw the boat from the side of the knuckle?

A. Yes.

X Q. 150. That knuckle had been there since the canal was built?

A. Yes, sir.

X Q. 151. It was a portion of the bank that never had been taken into the prism of the canal?

A. That had never been cut out by the steam shovels; yes, sir.

X Q. 152. In other words, it was left there from the beginning; not cut down to come into the canal prism, so called?

A. Yes, sir.

X Q. 153. While I have this blueprint, please tell me what that blueprint is, what it represents.

A. It is a plan or a sketch showing the location of the boulders on the slopes of the canal location, and shows the approximate size of the boulders also.

X Q. 154. Does it show anything about the bottom of the canal, the prism?

A. No, sir.

X Q. 155. That does not show on this at all?

A. No.

Mr. Blodgett: I will ask to have that blueprint marked.

[The blueprint is marked as "Bay Port Exhibit 2."]

X Q. 156. And where was the next shoal spot to the eastward that you found in June?

A. About station 190—a little to the westward.

Mr. Pillsbury: I have a plan here showing station 193.50. Is that the one you mean?

The Witness: I believe so.

300 X Q. 157. I will show you that blueprint, and ask you if that is what you refer to?

A. Yes, sir; that shows the shoal that we found at station 193.

X Q. 158. 193. You have got on there figures in white and figures in red. The figures in red were taken in August, 1916?

A. Yes, sir.

X Q. 159. And the figures in white were taken when?

A. June.

X Q. 160. June, 1916?

A. 1916.

X Q. 161. And that shows in June, 1916, what depth of water?

A. You mean by that the shoalest?

X Q. 162. The shoalest.

A. Nineteen.

X Q. 163. Nineteen; and it runs from 19 to 22 clear across the bottom of the canal?

A. Yes, sir.

X Q. 164. Now, in August—August 17, 1916—what does it show there?

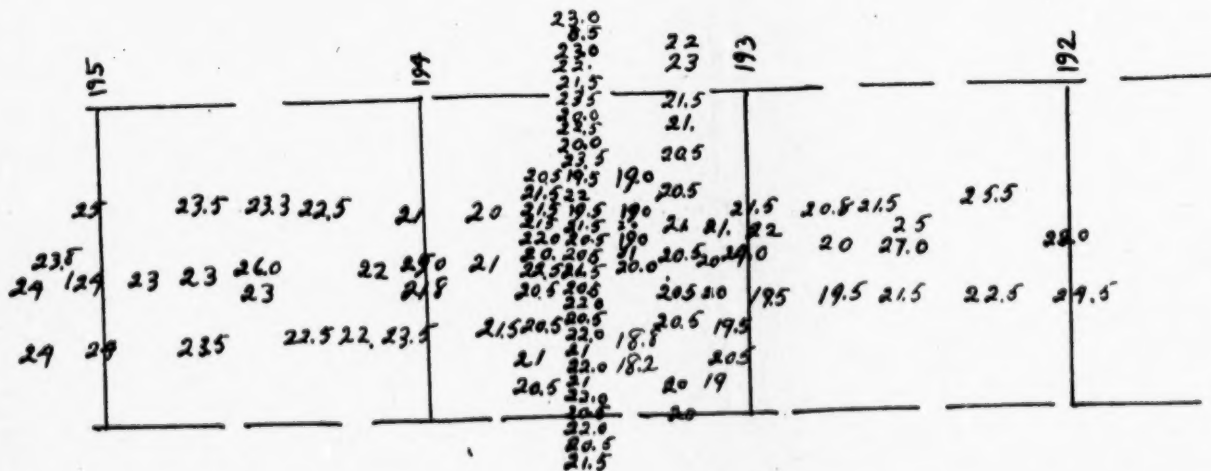
A. The shoalest water I find is nineteen and a half—19 away over—no, I find another, 18.8.

X Q. 165. And in August it shows twenty-three and twenty-two and a half feet in the next section, does it not?

BAY PORT EXHIBIT 3, Cases 1517 and 1518.
(Put in Evidence, page 300.)



300^a



SKETCH SHOWING SOUNDINGS
NEAR

STATION 193+50

About 1300 feet west of Bourgedale Ferry.

Depths at Mean Low Water Shown —

By Soundings of June 13, 1916.
Soundings of Aug 17 1916

A. Yes, sir; the shoal has increased.

X Q. 166. Between 194 and 195?

A. Yes, sir.

X Q. 167. And it shows 21 feet and 20 feet and 21 feet and 19 feet, 5, in 193 to 192?

A. Yes, sir.

X Q. 168. So that it shows that between June and August of 1916 that shoal spot had extended over three sections, does it not?

A. It was of that extent in August.

X Q. 169. Well, if you found all the shoals in June, it shows that it had extended all over those three sections where it had only been shoal in one section in June?

A. Yes, sir.

Mr. Blodgett: I will offer that blueprint.

[The blueprint is marked as "Bay Port Exhibit 3."]

(Here follows diagram marked page 300a.)

X Q. 170. Did you call that to Commodore Miller's attention at any time?

A. I may have; I don't know.

X Q. 171. As a matter of fact, he ordered dredges to come there to work, did he not—

A. I presume so.

X Q. 172. —shortly after that?

A. I think not shortly after that.

301 X Q. 173. How shortly was the dredge put to work there?

A. I don't think we did any work on that shoal much before the last of November.

X Q. 174. The last of November?

Mr. Pillsbury: I have a record that will help on that.

The Witness: That will be better.

Mr. Blodgett: Any record that he made or knows about, I am perfectly willing he should look at.

Mr. Pillsbury: I don't know whether he made it or not. It may help him to know when the dredge started.

Mr. Blodgett: If he did not make it or did not know anything about it—

Mr. Pillsbury: I don't care, if you don't want him to use it.

Mr. Blodgett: I say, if he knows anything about it, I am perfectly willing he should use it.

The Witness: That agrees with my memory—the lighter Trilby started at the work at station 192 on November 27th.

X Q. 175. And it was, then, from August 16th until the latter part of November before any work was done in reference to touching that shoal?

A. On that shoal; yes, sir.

X Q. 176. Yes. Did you make any further survey on that shoal between August 16th and November 20th or 28th when you started work with the dredge?

A. Probably.

X Q. 177. Did you make any blueprint showing any other soundings that you made there between those times?

A. I don't remember that.

X Q. 178. Do you remember whether the shoal had increased still further before November before you started dredging?

A. I think it had not increased much.

X Q. 179. It had not increased much?

A. No, sir.

X Q. 180. You think it had increased some?

A. Probably in area.

X Q. 181. In area. And you know, do you not, that the existence of that shoal was brought to the attention of Commodore Milier before the dredge came down there?

A. I don't know positively of that; no, sir.

302 X Q. 182. Didn't he ever talk with you about it during that time?

A. I think so; as I remember it, he did talk about the shoals with me; I don't know.

Sta 196

Sta 195

22.7 27

27

26.7 27

26

26.7 26

27

25.7 27

27

25.7 26

26

24.7 26

25

24

25

24

25

24

25

24

25

24

25

24

25

24

25

24

25

24

25

24

25

24

25

24

25

24

25

24

25

24

25

24

25

24

25

24

25

24

25

24

25

24

25

24

25

24

25

24

BAY PORT EXHIBIT 4, Cases 1517 and 1518.
Put in Evidence, page 303.

PORT EXHIBIT 4, Cases 1517 and 1518.
Put in Evidence, page 303.

Soundings on Shoal Sta 19070195
Nov 10, 1916 Score 50' = 1"

④

303^a

Sta 192

161045

Sta 190



X Q. 183. Your general memory is, that you did talk with him about it?

A. I think so, in more or less of a general way.

X Q. 184. Was any notice sent out, to your knowledge—so far as you know—to the public or anyone that there was not 25 feet depth of water in the canal?

A. I certainly told a great many people about it myself.

X Q. 185. Was any public notice sent out to ship owners, that you know of?

A. Not that I know of.

X Q. 186. Not that you know of. You do not know what draft of vessels were allowed to go through there at that time, yourself, do you; you had nothing to do with that end of it?

A. No, sir.

Mr. Blodgett: I want to call your Honor's attention to the fact that on that chart there is one depth that is marked "18 feet, 2 inches," just under the "18.8," I think. I do not want to stop with the witness to bother with that, but you will find that depth there.

X Q. 187. Now, in November, 1916, you put soundings between stations 190 and 195 on a blueprint, did you not?

A. Yes, sir.

X Q. 188. Is this the blueprint (passing the witness a blueprint)?

A. Yes, sir.

X Q. 189. And the centre line down there is the centre line of the 100-foot depth of channel?

A. It is approximately—the soundings are approximately on the centre line; and this is to represent the centre line.

X Q. 190. And the lighter figures on the right as we look at it are depths that you found there?

A. No, sir.

X Q. 191. What do those represent?

A. As I remember, these are pencil figures that I put on from day to day after this date, while we were working with this plan, to see what we were doing with the dredge.

X Q. 192. I see. This was while the dredge was working there?

A. Yes. These are also pencil figures representing the soundings on centre line.

303 Mr. Blodgett: I will ask to have that marked.

[The blueprint is marked as "Bay Port Exhibit 4."]

(Here follows diagram marked page 303a.)

Mr. Blodgett: That [Exhibit 4] shows that same section.

X Q. 194. Did you, Mr. Crocker, locate on some of the drawings that you made the boulder on which you thought the Bay Port struck the first time?

A. Well, I guessed at it; yes, sir.

X Q. 195. You guessed at it. Is this the plan or a copy of the plan on which you guessed at it [passing the witness a plan]?

A. I think so; yes, sir.

X Q. 196. Well, now can you tell us by refreshing your recollection from that where it was she struck?

A. Not the boulder that she struck on. The boulder that I tried to locate or tried to guess at was the boulder that put a hole in her.

X Q. 197. Well, the boulder that put a hole in her?

A. Yes, sir. I think it was this one [pointing], but I am not sure.

X Q. 198. Just mark that; put a line out here to the side of that, and mark it with a "C," will you,—your initial,—just so as to identify it, that is all.

[The witness writes his initial as requested.]

Mr. Pillsbury: Well Mr. Blodgett, how can he possibly know? Was he under water, or what is the claim?

Mr. Blodgett: Well, I don't know how he knows. He was in their employ at the time.

The Witness: As I remember it, it was the one.

Mr. Pillsbury: I don't suppose the fact he was in our employ makes him omnipotent. He must know what he is talking about to have it of any advantage.

Mr. Blodgett: I will ask him. That is the one he has marked [showing the plan to the Court].

The Court: You may ask him about it.

Mr. Blodgett: I asked him if he had located the rock that he thought put a hole in her when she went ashore the first time.

The Court: Yes.

Mr. Blodgett: And he has marked it.

The Court: Yes.

304 Mr. Pillsbury: The difficulty I have is, I don't see how in the world he could know anything about it.

Mr. Blodgett: I am going to ask him.

The Court: I assumed he did, or he would not have undertaken to answer.

Mr. Pillsbury: He must have known by hearsay, of course.

X Q. 199. Now, Mr. Crocker, how did you come, right at the time after the accident, to fix on what boulder you thought put a hole in her?

A. I knew about where the hole was from seeing the diver working, and I knew where the bow was and where the stern was. Then the station I picked—the boulder was about at the station of the hole, and I picked that station where that boulder was that might have caused the hole.



CHART

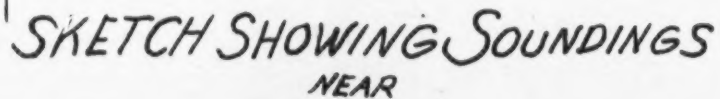
TOO

LARGE

FOR

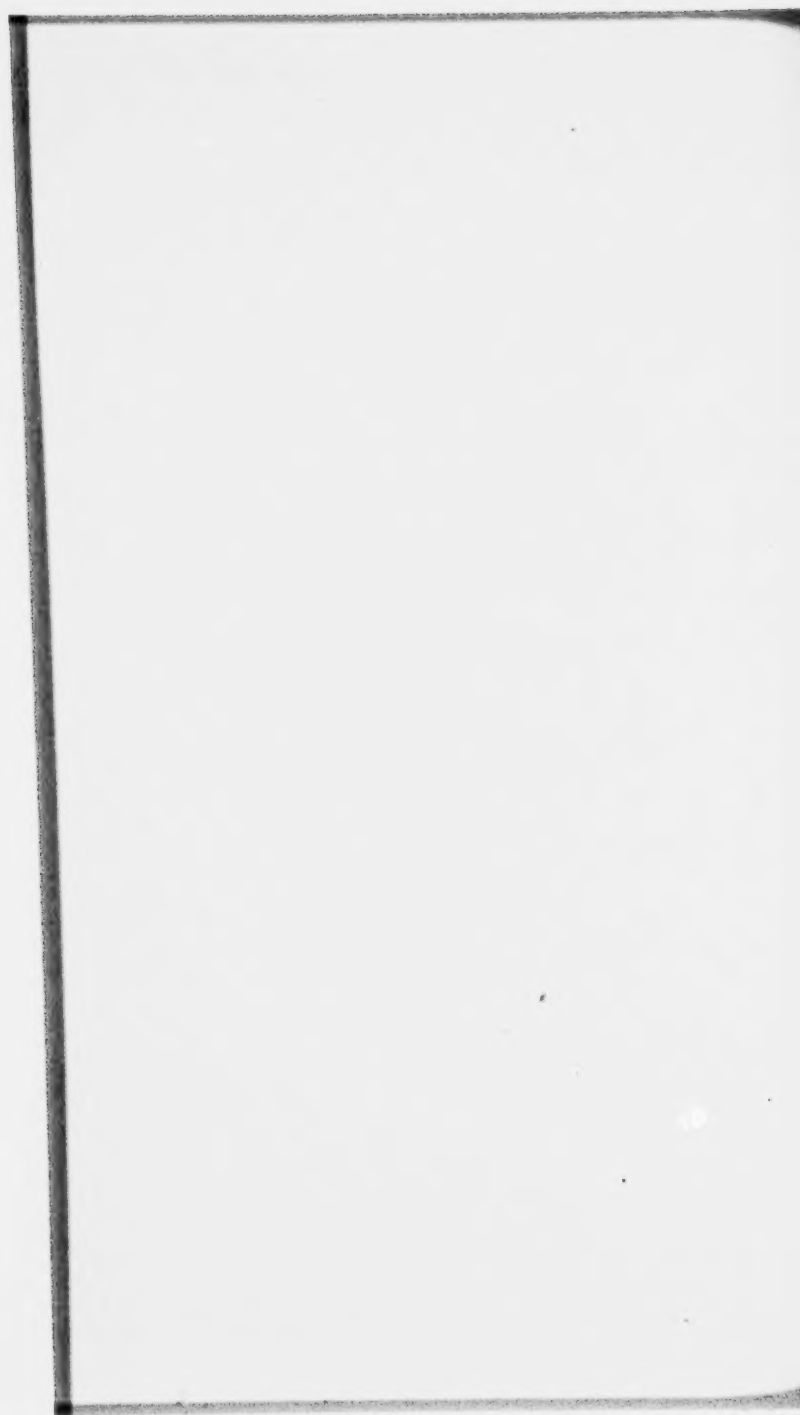
FILMING

(Put in Evidence, page 304.)



STA 250

Depths at Mean Low Water Shown — By Soundings of Nov. 20, 1916



X Q. 200. And that was in the position that the hole was——

A. Yes, sir.

X Q. 201. —with reference to where the vessel lay on the shore?

A. Yes, sir; I don't remember very clearly whether that is the one I picked out at that time.

The Court: It is not very important.

Mr. Blodgett: No, it is not very important. I will ask to have that marked.

[The plan is marked as "Bay Port Exhibit 5."]

X Q. 202. Now, here is a blueprint of station 250, from soundings taken November 20th, and that was made by you?

A. Yes, sir.

X Q. 203. And that showed the bottom in that location as you found it at that time?

A. Yes, sir.

Mr. Blodgett: I will ask to have that marked.

[The blueprint is marked as "Bay Port Exhibit 6."]

(Here follows diagram marked pages 304a and 304b)

X Q. 204. Now, Mr. Crocker, did you go down to her when she was sunk the second time?

A. Yes, sir.

X Q. 205. And you again located her in pencil on that blueprint as best you could?

A. Yes, sir.

X Q. 206. And is that, to the best of your recollection, the blueprint on which you located her [passing the witness a blue print]?

A. I believe it is, and I believe I made that pencil mark.

305 X Q. 207. And you made it from your observation and notes and marks which you took at the time?

A. Yes, sir.

X Q. 208. And it locates her bow just between 163 and 164 and her stern between 166 and 167?

A. Yes, sir.

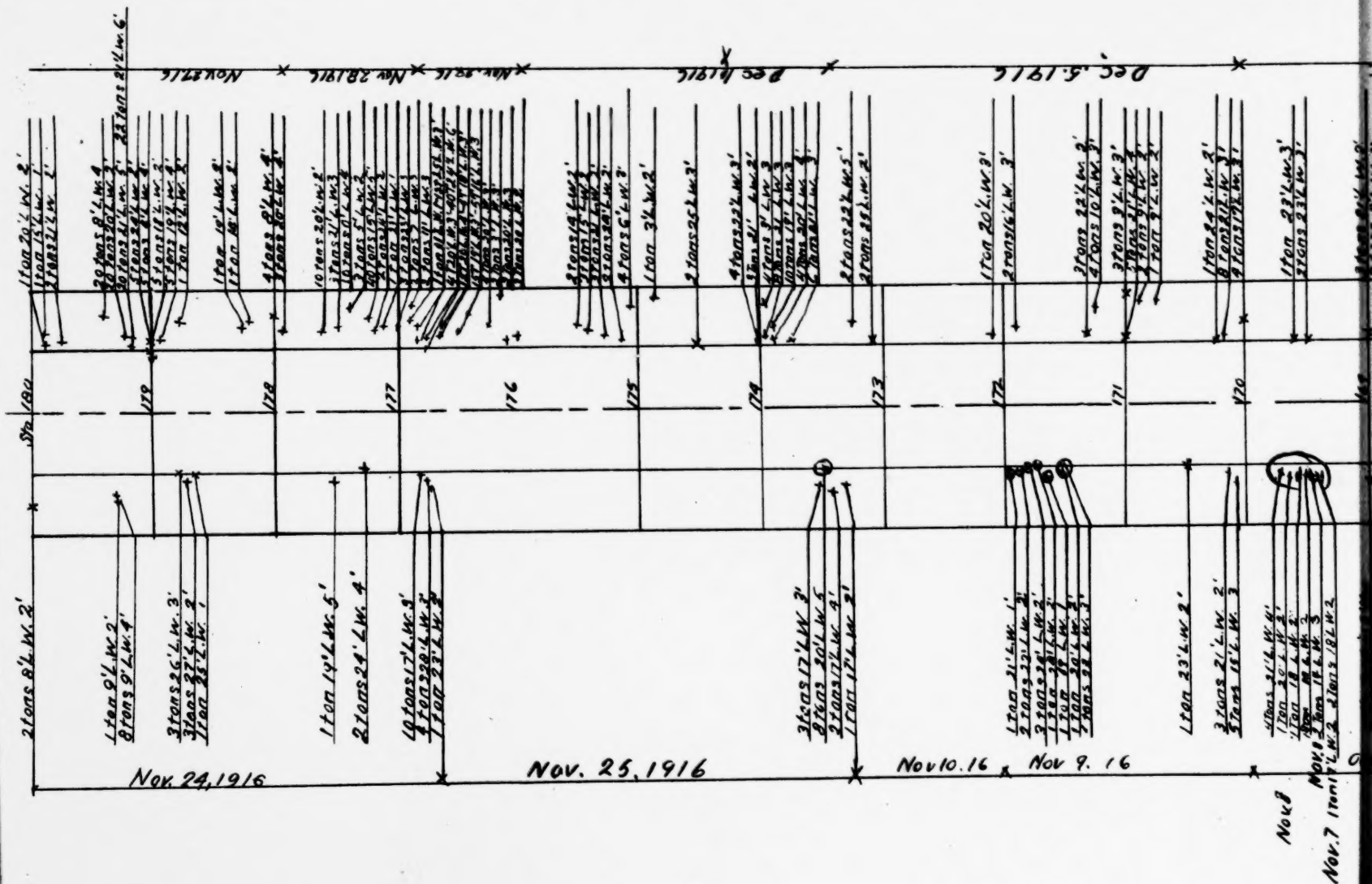
X Q. 209. And these other things show the boulders on the banks in the vicinity, as you testified to in reference to your other plan?

A. Yes, sir.

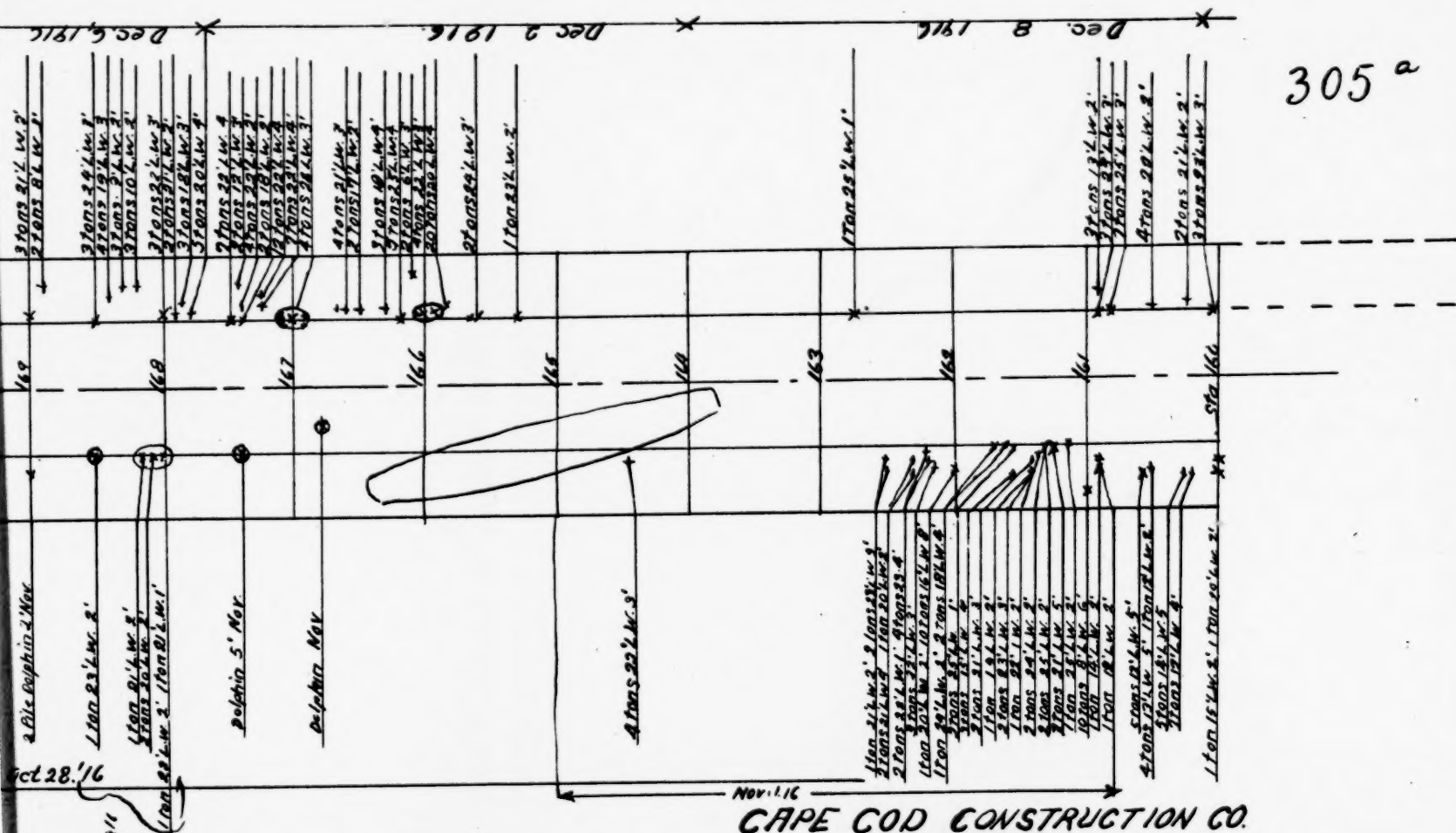
Mr. Blodgett: I will ask to have that marked.

[The blue print is marked as "Bay Port Exhibit 7."]

(Here follows diagram marked page 305a.)

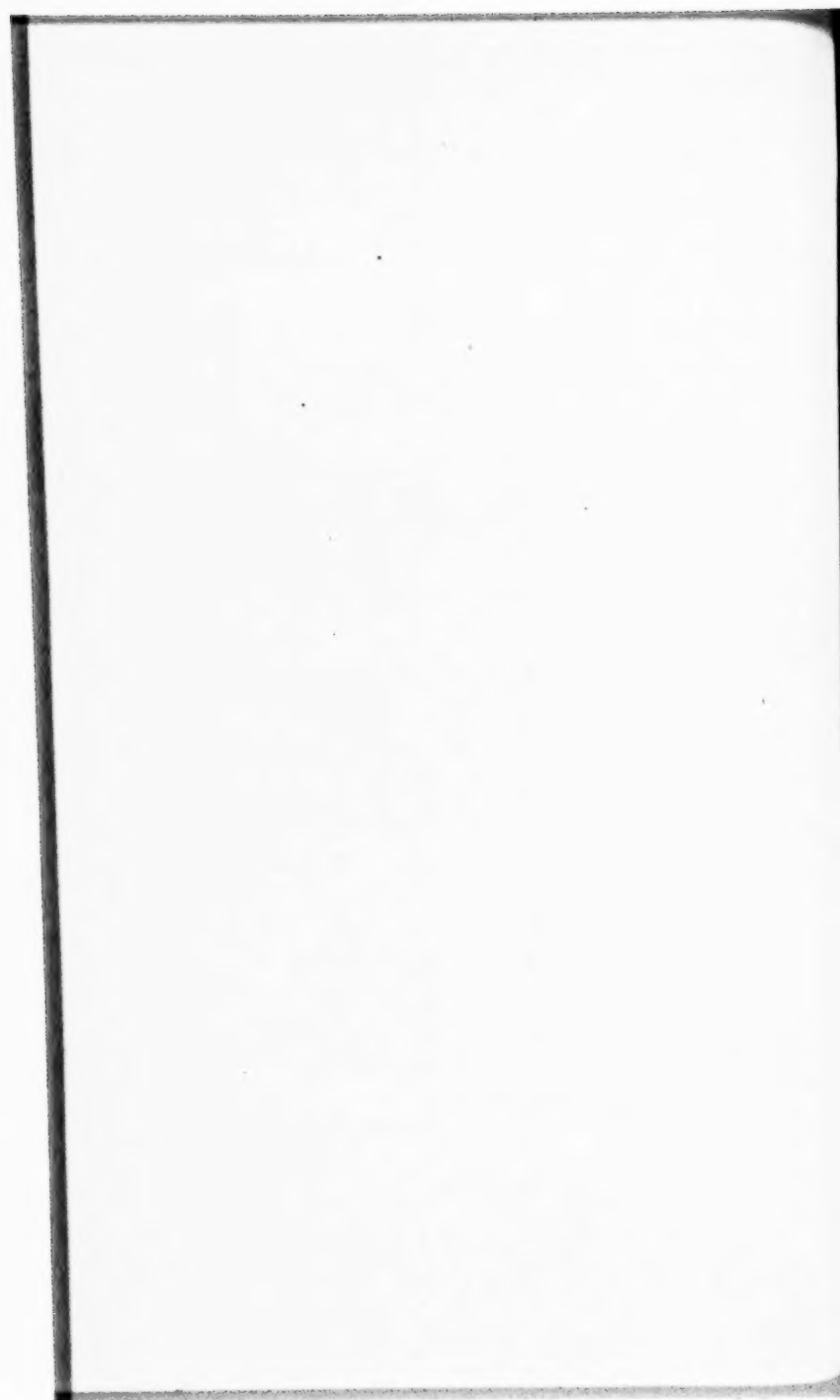


as 1517 and 1518.
e 305.)



305^a

CAPE COD CONSTRUCTION CO.
CAPECOD CANAL
SKETCH SHOWING
BOULDERS ON THE SLOPES
Scale 1 inch = 100 feet



X Q. 210. How much rise and fall was there, Mr. Crocker, there in the canal at the point where the Bay Port first went ashore?

A. At station 230?

X Q. 211. Yes.

A. About four and a half feet.

X Q. 212. And the current was about what,—varied from nothing up to what?

A. Daily maximum, about three and a half knots.

X Q. 213. Can you tell us where the 25-foot line is on your profile plan that you were testifying from?

A. It is a heavy white line drawn obliquely across the cross-section paper.

X Q. 214. A heavy white line drawn obliquely across?

A. That line is 25 feet below low water.

X Q. 215. How long after the tide turns to run towards the Sandwich end of the canal would it turn at the point where the accident took place, about 230?

A. I do not understand that question, Mr. Blodgett.

X Q. 216. I will change it. Your tide turns to run towards Massachusetts Bay, the flood tide,—with a vessel going through from Buzzard's Bay to Massachusetts Bay,—and where does it first show its effect of turning, at which end of the canal?

A. After it has been running towards the Sandwich end, I believe that it would first show its effect at the Sandwich end.

X Q. 217. At what?

A. At the Sandwich end.

X Q. 218. At the Sandwich end. When does the tide reach its maximum strength in the canal at about 230? You said it ran from nothing up to three and a half knots. When does it reach its maximum in that locality?

A. Roughly, about two hours after slack water,—a little more, I think.

306 X Q. 219. And after each slack, high or low?

A. Yes, sir.

X Q. 220. Can you give me the time interval between either low or high water and the change of current at 230?

A. High or low water at Buzzard's Bay,—the change of current is approximately all at one time; there is a very slight difference perhaps; I don't know just what it is,—ten minutes perhaps. Is that what you mean?

X Q. 221. Won't the current run to the southward in part of the canal and be running in the opposite direction in another part of the canal sometimes?

A. Possibly, but it would be for a very short time.

X Q. 222. Do you know how long, how much after the low or high water, the current changes at the Buzzard's Bay entrance to the canal? It changes practically at the same time all through?

A. As I remember it, about three hours after.

X Q. 223. About three hours after. Can you tell me what was the cause of these shoals in the canal, from your knowledge and study of the situation?

A. The drop in the rate of flow, the drop in the current.

X Q. 224. Well, did the vessels passing through have any effect in making up the shoals; did they pull the sand out?

A. Not in making the shoals; no, sir.

X Q. 225. Did they pull the sand out from the sides of the canal?

A. Some of them did; yes, sir.

X Q. 226. Did that cause scouring of the sides of the canal?

A. Yes, sir; to some extent.

X Q. 227. And in the bottom?

A. Yes, sir.

X Q. 228. In your judgment, there isn't any question but that these shoals that you have shown on these blueprints existed on December 13th, is there?

A. No, sir.

Mr. Pillsbury: I suppose you want him to have in mind what you have already brought out, that they had been dredging on one of these shoals between November and December 13th?

X Q. 229. The dredge that was working had not removed the shoal which you found——

A. Not entirely; no, sir.

307 X Q. 230. —at the time of the accident to the Bay Port, had it?

A. No, sir.

X Q. 231. Now, as a matter of fact, the bottom of this canal was very irregular, irrespective of these shoal spots that you have mentioned?

A. Yes sir.

X Q. 232. And always had been very irregular?

A. It varied perhaps in places from five to ten feet in 100 feet.

X Q. 233. Yes. And, in your judgment, would that have any effect on causing these swirls which you have testified to?

A. Not in my opinion; no, sir.

X Q. 234. What, in your opinion, caused the swirls that you have spoken about that were in this canal?

A. The only way I can account for them is, the friction on the sides of the canal. I think they are on the surface.

X Q. 235. But if they had gone down to the bottom, they would have come from inequalities of the bottom?

A. Yes, sir.

X Q. 236. And if they went down to the bottom, they would be likely to have an effect on a deep-draft vessel going through?

A. They might.

X Q. 237. Did the boulders on the sides have anything to do with these swirls that you found, in your judgment?

A. Possibly.

X Q. 238. At any time after June 13th up to after this accident it is a fact, is it not, that there was not 25 feet of water through the canal at mean low water?

A. Yes, sir.

X Q. 239. I mean, by that, in the 100-foot width?

A. Yes, sir.

X Q. 240. Now you spoke about going by this knuckle in a small boat or in a boat. The boat you went by in was a small rowboat, or power boat?

A. Both.

X Q. 241. Small boat?

A. Both.

X Q. 242. A boat that drew about a foot or a foot and a half?

A. I think I said "boats." I mean, by that, all kinds of boats.

X Q. 243. You did not go by there in all kinds of boats?

A. Yes, sir, I went by in all kinds of boats; I drifted by there in rowboats and in power boats.

X Q. 244. And those boats that you drifted by in, that you did not notice any effect on, were boats of shallow draft?

308 A. Not quite that, because, in a good many cases, we drifted by with two boats that had suspended between them a bar 30 feet long,—we did a great deal of that; and that bar was usually set 23 feet below low water, and it had no effect on that; and in some cases it was a heavy bar, heavy pipe,—two-inch pipe.

X Q. 245. And the bar went down. The keel of the boat did not go down?

A. The bar was suspended. The keel of the boat went down very little.

X Q. 246. Very little?

A. Yes, sir.

X Q. 247. You never went through in any boat that had its keel over a foot and a half or two feet below the surface of the water, did you?

A. I think so; yes. I cannot be sure of it. I think I have drifted by there in a tugboat.

X Q. 248. And those would have 8 or 9 feet?

A. Yes, sir.

X Q. 249. And those tugboats were short compared with the Bay Port?

A. Yes, sir.

X Q. 250. They were short boats?

A. Yes, sir.

X Q. 251. About 100-foot length?

A. Yes, sir.

X Q. 252. Or less perhaps. Did you see any of the boats go by that had any difficulty in steering at the knuckle?

A. At that point?

X Q. 253. Yes.

A. No, sir; I have seen a great many boats go by there, and I never saw any have any difficulty at that point.

X Q. 254. You had noticed them have difficulty at other points?

A. Yes, sir.

X Q. 255. At what points had you noticed them have difficulty in steering?

A. I remember one or two when down along just west of the Sagamore bridge. That was a tow. A good many different places.

X Q. 256. You noticed them have difficulty in steering in a good any places?

A. Yes, sir.

X Q. 257. What was the length of the rowboats you went through in; of course they were small rowboats?

A. Yes.

X Q. 258. Fifteen or twenty feet long,—10 or 15 feet long?

A. Yes.

X Q. 259. Did you know of the Maryland having any trouble in steering by there within a few days of this accident?

A. I don't remember the Maryland at all.

Mr. Blodgett: You don't remember her. I think that is all.

Redirect examination.

(By Mr. Pillsbury:)

Q. 260. Mr. Crocker, Mr. Blodgett asked you if the boulders that were on the slopes of the canal would cause any swirling of the water, and you said "possibly." What sort of a swirl would they cause?

A. That was perhaps just an idea of my own. I think I answered one of your questions, that I thought those swirls were due to friction. Well, anything that was on the slopes or near the surface of the slopes that tended to increase that friction would increase the swirls. Therefore, boulders would have something to do with it.

Q. 261. And the swirls you were thinking of were surface swirls?

A. I think they are, the ones that you see.

Recross-examination.

(By Mr. Blodgett:)

X Q. 262. Mr. Crocker, I asked about the tide table. Did you get up a tide table, a current table for October, November and December, 1916?

A. Yes, sir.

X Q. 263. And is that it?

A. I think it is.

Mr. Blodgett: I will ask to have that marked.

[The current table is marked as "Bay Port Exhibit 8."]

Mr. Blodgett: That is all.

Mr. Pillsbury: That is all, Mr. Crocker.

GEORGE G. ROCHESTER (sworn).

(By Mr. Pillsbury:)

Q. 1. What is your full name, please?

A. George G. Rochester.

Q. 2. And you live in Buzzard's Bay?

A. Onset, Massachusetts.

Q. 3. Onset. What is your occupation?

A. Pilot on the Cape Cod Canal.

Q. 4. And in December, 1916, you were a pilot there?

A. Yes, sir.

Q. 5. Licensed by the United States Government?

A. Yes, sir.

Q. 6. You were the one who picked up the Bay Port in Buzzard's Bay on the 13th of December?

A. Yes, sir, the 13th.

310 Q. 7. The 13th of December, 1916. And you went out in the tug Dalzelline, did you?

A. Yes, sir.

Q. 8. And in consequence of a signal which they displayed for a pilot?

A. Yes, sir.

Q. 9. What signal did they display?

A. They blow a whistle at Wing's Neck; and that is telephoned up to the Buzzard's Bay office, and the pilots are sent down from there.

Q. The signal for a pilot, then is a whistle, is it?

A. Yes, sir.

Q. 11. Now, when you got to the boat, whom did you see?

A. I saw the master of it.

Q. 12. Captain Hammett?

A. Yes, sir.

Q. 13. And what took place?

A. I asked him if he was ready to proceed through the canal. He said he was ready.

Q. 14. At that time was a white flag flying?

A. At the Neck; yes, sir.

Q. 15. At the Neck. Tell us about that white flag, Captain Rochester. What does that indicate?

A. That indicates that the canal is clear, and anything bound to the eastward may proceed.

Q. 16. That is, it is something like a block signal on the railroad, is it not?

A. Yes, sir.

Q. 17. The canal being narrow you cannot take a boat in going east when there is a boat in the canal going west?

A. No, sir.

Q. 18. So that a signal is displayed showing that the canal is free from other shipping going in the opposite direction, and that is what this white flag is?

A. Yes, sir.

Q. 19. Now, will you state what took place? Was anything said about whether they wanted the assistance of a tug or not?

A. I suggested that they take the assistance of the tug Dalzelline.

Q. 20. You suggested that to Captain Hammett?

A. Yes, sir.

Q. 21. What did he say?

A. He said that was up to my judgment; if we thought it was necessary, we would take the boat.

Q. 22. By the way, captain, had you piloted that Bay Port through the canal before?

A. Yes, sir.

Q. 23. Do you remember when that was?

A. That was in August, 1916.

311 Q. 24. And the same captain?

A. I don't remember.

Q. 25. In any event, the same boat?

A. The same vessel.

Q. 26. That was going the other way?

A. Going in the opposite direction, only she had no cargo in her.

Q. 27. Had no cargo; she was light. Now, on that occasion did you have a tug?

A. No, sir.

Q. 28. And did she go through the canal all right that time?

A. Yes, sir.

Q. 29. Had no difficulty whatever?

A. No, sir.

Q. 30. When you passed this so-called knuckle on that trip, did you have any difficulty with her?

A. No, sir.

Q. 31. Or when you passed either of those shoals that have been described, did you have any difficulty?

A. No, sir.

Q. 32. Well, now, to come back to the time in question, about what time did you start for the canal?

A. We left there at 12.30 p. m. with the tug Dalzelline out ahead on a short hawser of about twenty fathom.

Q. 33. Did you know what the state of the tide then was?

A. Yes, sir.

Q. 34. What was it?

A. The tide made west in the canal that day at ten minutes of twelve,—11.50.

Q. 35. So that at the time you started in the tide was at what stage?

A. The first of the west current.

Q. 36. Did you consider that a favorable tide to take the ship through on?

A. Yes, sir.

Q. 37. Why?

A. Sir?

Q. 38. Why did you consider that a favorable tide?

A. On account of having that type of vessel through there loaded. I thought it was an excellent time to take her through, on account of us not going as fast as we would have been going if we had had a tide running to the eastward.

Q. 39. That is, you wanted a head tide, so your movements would be—

A. Slow.

Q. 40. —slow. Could you control her better under those conditions?

A. I thought we could, with that tugboat out ahead with a short hawser to guide her.

312 Q. 41. Could you control her better under those conditions than you could at slack water?

A. I don't think so.

Q. 42. Let me ask you, when would slack water have come?

A. That would have taken place too late in the day to take her through.

Q. 43. She could not have got through that day if you had waited for slack water?

A. No, sir.

The Court: Was the tide up or down at this time? Was this at high water or low water?

The Witness: This was at high water; that is, the tide had just started to fall.

The Court: When it is running west in the canal, it is falling?

The Witness: Yes, sir.

Q. 44. Captain, do you recall the boat sheering after she got in the canal?

Mr. Blodgett: Just let him tell what he did, what he saw.

Mr. Pillsbury: I wanted to direct his attention, because we have been over this with so many witnesses that I feel——

The Court: Yes; let us get right down now to the issue.

Mr. Pillsbury: I am afraid I have overdone it a little in calling so many witnesses.

Q. 45. Do you recall this boat sheering—I will put it that way—before the sheer when the accident took place?

A. Yes, sir; once before.

Q. 46. Where was she when she sheered the first time?

A. Just east of Bourne Bridge.

Q. 47. East of the Bourne Bridge. Now, captain, what was the current condition at that point and the depth of water?

A. There was probably 25 feet of water there at the time when she took the first sheer.

Q. 48. Was there any unusual condition or current in the way of swirls or eddies or otherwise?

A. No, sir.

Q. 49. Did the captain make any statement at that time about that sheer?

A. Why, I have forgotten just what conversation took place, but I know I remarked that we must be very careful with her on account of her taking that sheer; we must watch her very closely that she wouldn't take another one.

313 Q. 50. And you kept along up the canal?

A. Yes, sir.

Q. 51. When you got to about station 230 she took another sheer, did she?

A. Yes, sir.

Q. 52. And went aground as has been described?

A. Yes, sir.

Q. 53. Had the current been increasing in strength as you had proceeded on your journey?

A. Yes, sir.

Q. 54. You did not stay at the scene very long after the grounding, did you?

A. I stayed until 10.20 that night.

Q. 55. And the other witnesses have described what took place. She simply stayed on the bank without changing her position, did she not, up to the time you went away?

A. Yes, sir.

Q. 56. Did you, after that, have anything to do with the vessel?

A. Not at all, sir; nothing at all.

Q. 57. Nothing at all. Have you been here while Mr. Crocker has been testifying?

A. No, sir; I just arrived.

Q. 58. At about station 230 have you noticed swirls or eddies in the water?

A. Well, they are all through the canal; there would be when the tide is running strong.

Q. 59. There are various places where you will see these swirls and eddies?

A. Yes, sir.

Q. 60. And I suppose there are places in the canal where it is harder to steer a vessel than it is in other places; the current varies more or less, does it not?

A. Yes, sir.

Q. 61. And was this one of the places where it was somewhat more difficult to steer than in some other places in the canal?

A. Yes, sir.

Q. 62. Had you ever had any accident when you were piloting vessels at this point?

A. No, sir; never before.

Q. 63. How many deep draft vessels before this time had you taken through the canal and by this so-called knuckle, do you suppose?

A. A great number.

Q. 64. How many years have you been piloting down there?

A. Since 1915.

Q. 65. And you were piloting about how often; can you give us an idea?

A. Well, every day, anyway.

Q. 66. Every day?

A. Some days I wouldn't have anything.

314 Q. 67. What proportion of the vessels that you piloted would have a deep draft?

A. What were they?

Q. 68. What proportion of them would be deep draft vessels?

A. Why, at times we had the regular freight boats running there, the Metropolitan Line vessels.

Q. 69. The Metropolitan Line vessels would draw how much?

A. Eighteen or 19 feet.

Q. 70. Eighteen or 19 feet. Were you there when Captain Joseph Lewis arrived that night?

A. Yes, sir.

Q. 71. What did you see him do, if anything?

A. It was after dark, sir, and I didn't see much of him, only to know that he arrived upon the scene.

Cross-examination.

(By Mr. Blodgett:)

X Q. 72. Captain, you got your orders to go down to take this boat through Captain Geer?

A. Not from Captain Geer personally, but from some of the dispatchers there.

X Q. 73. Some of the Canal Company employees?

A. Yes, sir.

X Q. 74. And they came to you from Captain Geer and instructed you to go down and get her?

A. Told me to go down and get a collier at the Neck.

X Q. 75. And bring her through?

A. Yes, sir.

X Q. 76. And you went down on the Dalzelline?

A. Yes, sir.

X Q. 77. Did you tell the Dalzelline to take you down, or did they tell the Dalzelline to take you down?

A. Why, I don't know just how that occurred, whether he got his orders from the office, or whether I went to the wharf and asked him to take me down.

X Q. 78. At any rate, he took you down?

A. Yes, sir.

X Q. 79. And when you got down there you found the white flag set?

A. Yes, sir.

X Q. 80. And that flag was set to allow you to go through?

A. Yes, sir.

X Q. 81. And you could not bring the boat through until the Canal Company told you to and set the flag?

A. No, sir.

X Q. 82. That is, they had control of when the vessels were let go through?

A. Yes, sir.

Mr. Pillsbury: Just a moment. I do not believe that this witness could answer that in quite that form. I think that must be somewhat more definite. It appears this flag was a signal that the canal was clear.

The Court: I think that is all right as it stands.

Mr. Pillsbury: Well, I will try to clear it up.

X Q. 83. When you got down there you asked Captain Hammett the draft of the vessel, did you not?

A. Yes, sir.

X Q. 84. Do you remember what he told you?

A. He told me 18 feet,—that the 18-foot mark was just showing.

X Q. 85. Did you look at it yourself?

A. I did not, sir.

X Q. 86. Did you ask him how much he drew forward?

A. No, sir.

X Q. 87. Was the vessel trimmed properly when you took her there?

A. I should say she was; I noticed nothing unusual about her.

X Q. 88. And she was trimmed by the stern at that time?

A. Yes, sir.

X Q. 89. About how much by the stern was she trimmed at that time?

A. I couldn't say.

X Q. 90. Well, enough to be noticeable?

A. Yes, sir.

X Q. 91. Now, she came along all right from the time you took hold of her, did she not, until practically just before the accident?

A. Until we got through the Bourne Bridge.

X Q. 92. Until after you came through the Bourne Bridge?

A. Yes, sir.

X Q. 93. She came along nicely?

A. Very well.

X Q. 94. And she did not sheer appreciably?

A. No, sir.

X Q. 95. And, as far as you saw, all the time she was handled properly under your directions by the men on the vessel?

A. Yes, sir.

X Q. 96. They handled her and you handled her as well as you could under the conditions under which you came through?

A. Yes, sir.

X Q. 97. Now, you said something about her sheering first to the eastward of the Bourne Bridge?

A. Yes, sir.

X Q. 98. She broke that sheer easily?

A. Yes, sir.

X Q. 99. Broke it herself, with her own helm?

A. Well, with the assistance of the tugboat out ahead.

316 X Q. 100. Did you give any signals to the tugboat on that sheer?

A. No, sir; not at that time.

X Q. 101. So that the tugboat did not do anything to help break that sheer so far as you know?

A. No, sir.

X Q. 102. The first sheer she took was which way,—to starboard?

A. To port.

X Q. 103. To port. Was that after you had passed the Bourne Bridge?

A. Yes, sir.

X Q. 104. Now, you testified before the steamboat inspectors, did you not, captain, on January 8, 1917, in reference to this accident?

A. I have forgotten the date, but I sent a report shortly after.

X Q. 105. Well, you testified before them, did you not; you went before them and were sworn and testified?

A. No, sir.

X Q. 106. Sure about that?

A. Why, I called up there, but I was not sworn. I went up there to talk the matter over with them. I had sent them a report.

X Q. 107. You were not sworn?

A. I think not.

X Q. 108. Are you sure of that?

A. I wouldn't be positive.

X Q. 109. Your name is George G. Rochester?

A. Yes, sir.

Mr. Blodgett: And there is no question but what this is the record, is there?

Mr. Pillsbury. If you say it is.

Mr. Blodgett: It came from their office. This is headed "January 8, 1917. 11.15 a. m.," and it says: "George G. Rochester, Cape Cod Canal Pilot, Onset, Mass., having been duly sworn, was examined as follows:" Does that refresh your recollection?

A. Yes, sir.

X Q. 110. You testified as follows, did you not, in that examination:

"Q. Did you board the steamer 'Bay Port' as Pilot on December 13, 1916?

A. Yes, sir.

Q. Did you take charge of conning the vessel through the Canal?

A. Yes, sir.

Q. Was the master of the 'Bay Port' with you?

A. Yes, sir.

Q. Did the vessel handle properly until you got beyond Bourne Highway Bridge?

A. Yes, sir.

317 Q. State the circumstances after passing that bridge as they came to your knowledge.

A. We had the tugboat 'Dalzelline' out ahead with a hawser on the ship's bow, length about 20 fathom. Ship handled well after we passed Bourne Bridge until we came to about a distance of half way through the Canal when she suddenly took a sheer to starboard for the south bank. I was watching her very closely and the first time she took a sheer I ordered the helm to starboard and starboard some more. The third order was hard a starboard. I blew an alarm

whistle for the 'Dazelline' to pull the ship's bow to port or to the northward to break that sheer, which was responded to at once. When I saw the ship wouldn't recover from that sheer with a hard a star-board helm and the boat pulling to port, I ordered the engines full speed astern, which checked the headway of the ship some, but she continued on that sheer and struck the south bank of the Canal. We blew whistles of distress which were responded to in a short time by tugs 'John C. Stuart' and 'Hazelton,' which were laying at that time at the east end of the Canal. We attempted to pull her off from the bank, but the tide was falling and we couldn't do so. I suggested then that the 'John C. Stuart' get her siphon into the ship that we might with the assistance of the ship's pump keep her afloat. There were no manholes or small hatches into which we might get a siphon. The only place we could get a siphon in was at either end of the ship, in the fore peak or in the engine room or fire room, whichever it might be. The ship was making water but it didn't get at the engines. It was in the cargo hold and we couldn't reach it. There was one air space somewhere about amidships, but we couldn't get our siphon in there for there was no opening of any sort large enough for a siphon. The ship's pumps were kept going, but the water was still rising in the cargo hold. Captain Lewis, of the Scott Wrecking Company, came aboard about 6.30 that evening. I issued no more orders after Captain Lewis went aboard the ship. I left the ship at 10.10 that night, still on the bank. I had the tug 'John Stuart' keep hooked up head on, crowding the ship onto the bank so that the rising tide would not take her away from the bank and that was the condition under which I left the ship at 10.10 that evening."

Was that correct?

A. Yes, sir.

X Q. 111. And that was the same statement that you had
318 made to Commodore Miller right after the accident, was it not?

A. Yes, sir.

X Q. 112. Now will you tell us what caused that sheer to star-board?

A. I couldn't say, sir; she took it very suddenly.

X Q. 113. Have you any idea?

A. No, sir.

X Q. 114. Do you think she smelled bottom?

A. Why, I couldn't say.

Mr. Pillsbury: Just a moment. Well, I have no objection.

X Q. 115. Do you think she smelled bottom?

A. I couldn't say what made her take the sheer.

X Q. 116. So you haven't any idea why she took that sheer?

A. No, sir.

X Q. 117. Do you remember being asked this question by the inspectors:

"Q. Have you any opinion as to what caused that decided sheer to starboard?"

A. I have forgotten, sir.

X Q. 118. And do you remember answering it in this way:

"In my experience in the Canal and particularly that reach, which is straight, ship heading about northeast on that long reach or straight reach, I noticed always that ships handled bad at that particular point and I have always been more than cautious at that particular place. On that north bank, during the construction, there was a dam across there that went diagonally across and they worked in still water on both sides of that dam in the dredging operations. After they had it down to grade on both sides of that dam they removed the dam, and always on that north shore there has been a knuckle making off from the north bank, a place probably 150 feet, that has never been taken into the prism line. For instance the tide going west as it was that day, the tide has a tendency to hit that knuckle and shoot the tide off some as it would be on the current going east and possibly a shoal there. I wouldn't say about that because I never have sounded in the Canal. We always have to take the engineers' word for the depth, but there is always a swirl of tide in that locality. West of this is a curve in the Canal to the right going on the westward and a curve up here, a reverse curve, but this being so far in the middle of the two curves I don't think the

319 curves have anything to do with that swirl. I think it is caused by that projection from the north bank. That is my idea of it and I have been there ever since the Canal was opened."

Do you remember making that answer?

A. Yes, sir.

X Q. 119. And was that correct?

A. That was correct.

X Q. 120. Had you been notified of any shoal spot just before you got to that knuckle?

A. Yes, sir.

X Q. 121. Of an 18-foot depth?

A. Yes, sir.

X Q. 122. You had been notified of that?

A. Yes, sir.

X Q. 123. Who notified you?

A. Why, I think by Captain Geer.

X Q. 124. That was the first loaded pig barge you had ever taken through, was it not?

A. Yes, sir.

X Q. 125. Now, speaking of the tide, if you took a vessel through that smelled bottom and started to sheer, it would be harder to break that sheer on an ebb tide than it would on a flood tide, would it not?

A. Well, there is about the same velocity each way; I don't know as it would make any difference which direction you were going if you had the same velocity of tide.

X Q. 126. You do not think that anyone on the vessel did anything out of the way do you?

A. I certainly do not.

X Q. 127. And you do not think you did anything out of the way,—you did the best you could?

A. Yes, sir.

X Q. 128. You did the best you could, going through at the time you did?

A. Yes, sir.

X Q. 129. And with the bottom of the canal in the condition it was?

A. The shoal that I had been notified of was some 1,000 or 1,500 feet west of that place.

X Q. 130. And you went through as best you could?

A. Certainly.

X Q. 131. Did the best you could?

A. Yes, sir.

X Q. 132. The Bay Port's engines were kept going as you ordered them to keep going?

A. Yes, sir.

X Q. 133. And you had to keep them going in order to stem the tide?

A. Yes, sir.

320 X Q. 134. As a matter of fact, you stated to Commodore Miller, did you not, and to Captain Geer that in your opinion it was the knuckle and the current from the knuckle that caused the accident?

A. Why, we have more or less of those currents all through there; there is projections all through there.

X Q. 135. I say, your statement to them was, that it was this knuckle that caused this accident?

A. I have no copy of the statement I made, and it is over a year ago.

X Q. 136. I say, did you not state that to them orally?

Mr. Pillsbury: I think if you have a statement——

Mr. Blodgett: I haven't got any statement.

Mr. Pillsbury: You have not asked him to produce any, either.

Mr. Blodgett: We did in our interrogatories.

Mr. Pillsbury: Do you ask for any statement he signed?

Mr. Blodgett: No; I ask you for any statement that you have that was made to either Commodore Miller or to Mr. Greer, or both, in reference to this accident. I asked for it in the interrogatories, and I ask for it now,—any statement in the form of question and answer or any other way. I asked in the interrogatories for it and you said you did not have it.

Mr. Pillsbury: You asked for reports; you did not ask for statements.

The Court: Well, you are not entitled to it under interrogatories; and if I had been asked to rule upon it, I should not have made them disclose it. That is exactly what I have ruled should not be disclosed on interrogatories,—statements taken from witnesses with reference to litigation.

Mr. Blodgett: I am referring to what he said to Captain Geer

and Commodore Miller in reporting this accident, before any litigation started.

Mr. Pillsbury: It has already been brought out that it was an investigation of the accident after the event, to find out the facts. He has not made any report whatever.

The Court: What a party does in defence of his suit, to prepare the defence, or to prepare the prosecution of the suit, he is
321 not compelled to disclose on interrogatories. What information he acquires in pursuance of his business he is to disclose.

X Q. 137. Captain, what, in your judgment, caused the accident the first time she went aground?

A. Nothing but the sheer that she took that we couldn't break.

X Q. 138. And what caused her to sheer, in your judgment?

A. I couldn't say what caused the first sheer nor the last one.

X Q. 139. Do you think the knuckle and the current near the knuckle had anything to do with it?

A. Possibly.

X Q. 140. Do you think the shoal spot she had just passed over had anything to do with it?

A. No, sir; we were too far by the shoal.

X Q. 141. Did you begin to sheer to the northward when you were on that shoal?

A. No, sir; she took no sheer on that shoal.

X Q. 142. Where did she take the sheer,—before she got to it?

A. Yes; the shoal is east of where she took the first sheer.

X Q. 143. She sheered before she got to the shoal and then sheered again after she got off, you say?

A. Yes, sir.

X Q. 144. After she came off did you see her go on before she struck the second time,—were you there?

A. No, sir; I didn't see her again until I saw her under water, or submerged.

X Q. 145. You did not see her again at all?

A. No.

Mr. Blodgett: That is all.

Mr. Pillsbury: Any questions, Mr. Park?

Mr. Park: No.

Mr. Pillsbury: That is all, thank you.

HENRY DUNBAR, (sworn).

(By Mr. Pillsbury:)

Q. 1. What is your full name?

A. Henry Dunbar.

Q. 2. Where do you live?

A. Sandwich.

Q. 3. What is your occupation?

A. Engineer.

Q. 4. You are the present engineer of the Canal Company, are you not, at Sandwich?

A. Yes.

Q. 5. How long have you held that position?

A. Since June, 1917.

322 Q. 6. And what has been your engineer training, very briefly?

A. Why, I have graduated at Stevens Institute of Technology,—I have had two years' experience in California, about four years' experience on the canal and two years' dredging work.

Q. 7. The two years' experience on the canal was in what capacity?

A. Why, I have acted on the canal in the capacity of assistant engineer for the Construction Company; as engineer and superintendent for contracting companies and as resident engineer for the Canal Company.

Q. 8. Directing your attention to the place where the Bay Port first struck, namely, at 230, have you at any time made soundings along the slope there, along the prism of the canal?

A. I have.

Q. 9. When?

A. On August 13 and 14, 1917.

Q. 10. What does that blueprint which I have just handed you show?

A. That represents a plan of the soundings taken on those dates.

Q. 11. A plan of the soundings?

A. Of the soundings.

Q. 12. And what section of the canal does it cover?

A. Why, it is from station 235 to station 230 plus 50.

Q. 13. Does the plan show anything in addition to the soundings; that is, those curved marks,—what do they show?

A. It is contoured.

Q. 14. What do the contours indicate?

A. Why, they indicate,—for instance, the 20-foot contour would indicate elevations of 20 feet below mean low water. The contours are all based on depths below mean low water. And the mean low water is the mean low water at that point in the canal.

Q. 15. Have you any plan showing the contour of the shore there where this so-called knuckle is?

A. Above the water line, no.

Q. 16. Does this plan here show it below the water line?

A. A projection below the water line?

Q. 17. Does it show whether or not there is any projection below the water line?

A. I should say there was not.

Q. 18. The plan would indicate it if there were any projection below the water line?

A. Yes, it would.

323 Q. 19. And there is no such projection, as I understand you?

A. No.

Q. 20. Is that correct?

A. That is correct.

Q. 21. What is this so-called knuckle; will you describe it?

A. Why, when the canal was originally constructed a portion of the work, especially in the mid-section, was done by steam shovel; and the steam shovels went down about to low water, in some cases perhaps a little below. And in order to keep the water out it was divided up into sections; a series of dams were run across the canal, and in some cases pumps were used to keep out the water. One of those dams went across the canal at about station 233. Finally the dredges were worked from the east end of the canal and the west end of the canal and met at 233; that is, this dam at 233 was the last portion of the ground to be removed in completing the canal, of course; and in removing this dam the dredges were working on ranges, so that they would cut a 100-foot channel. And this portion of the dam left a lump on that side. But the dam was only built from about low water line to some point above that and had nothing whatever to do with anything below the surface; and this lump is visible now and is, I presume, what is called the knuckle,—it is the only thing that I can find there at that point.

Q. 22. So that does not extend below the low water line?

A. That obstruction up above, that is visible above the water line, would have nothing whatever to do with that effect below.

Q. 23. Have you knowledge as to whether the condition that exists there now is the same that has existed ever since the dam was built,—I mean ever since the canal was built?

A. I have every reason to suppose that condition there now is about the same as it was when the canal was constructed.

Q. 24. At any time have you made tests of the current at this point?

A. Yes, sir.

Q. 25. What were those tests and when did you make them?

A. Why—

Q. 26. Perhaps you had better tell us when, and then tell us what they were.

A. The tests were made recently, within a week.

Q. 27. And at what state of the tide?

A. They were made with a west current, a current running about from probably three to three and a half knots an hour, the tidal conditions being practically similar to those that occurred when the accident took place. And this test consisted of running a float drawing about 18 feet of water from approximately station 225 to 240. This float was started in at some point east of 225,—cast overboard in the channel and the observations were taken on it,—so giving us observations about every 50 feet of the float's travel. And the lines showing the actual path that the float took in the canal were plotted on a plan.

Q. 28. Now, what was the result of that test and what did it show and indicate as to the current or eddies or swirls?

A. Why, I could not see any indication of extraordinary conditions at that point.

Q. 29. Have you got the plan that was made?

A. I believe it is on your table.

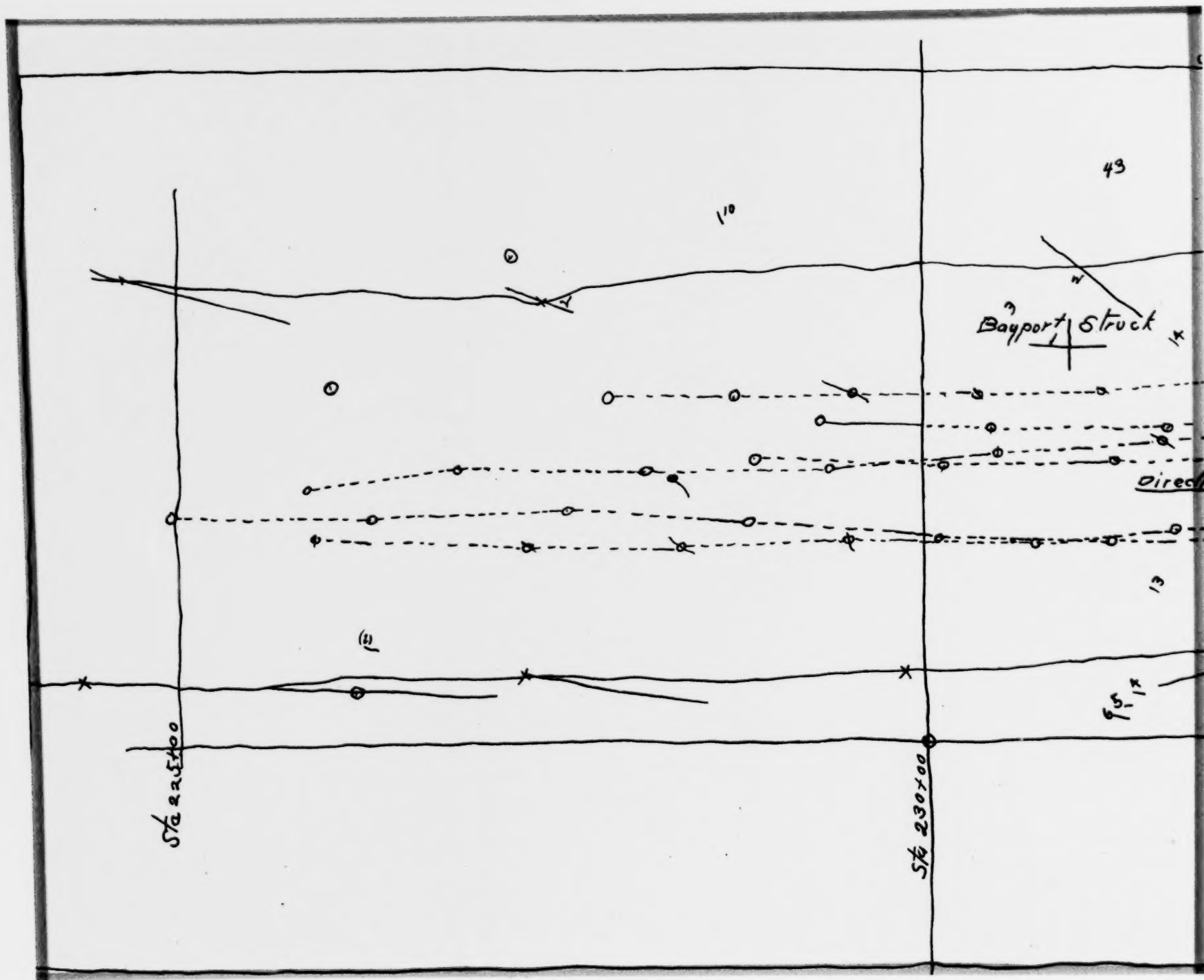
Q. 30. Is that it?

A. That is it.

Mr. Pillsbury: I will offer this.

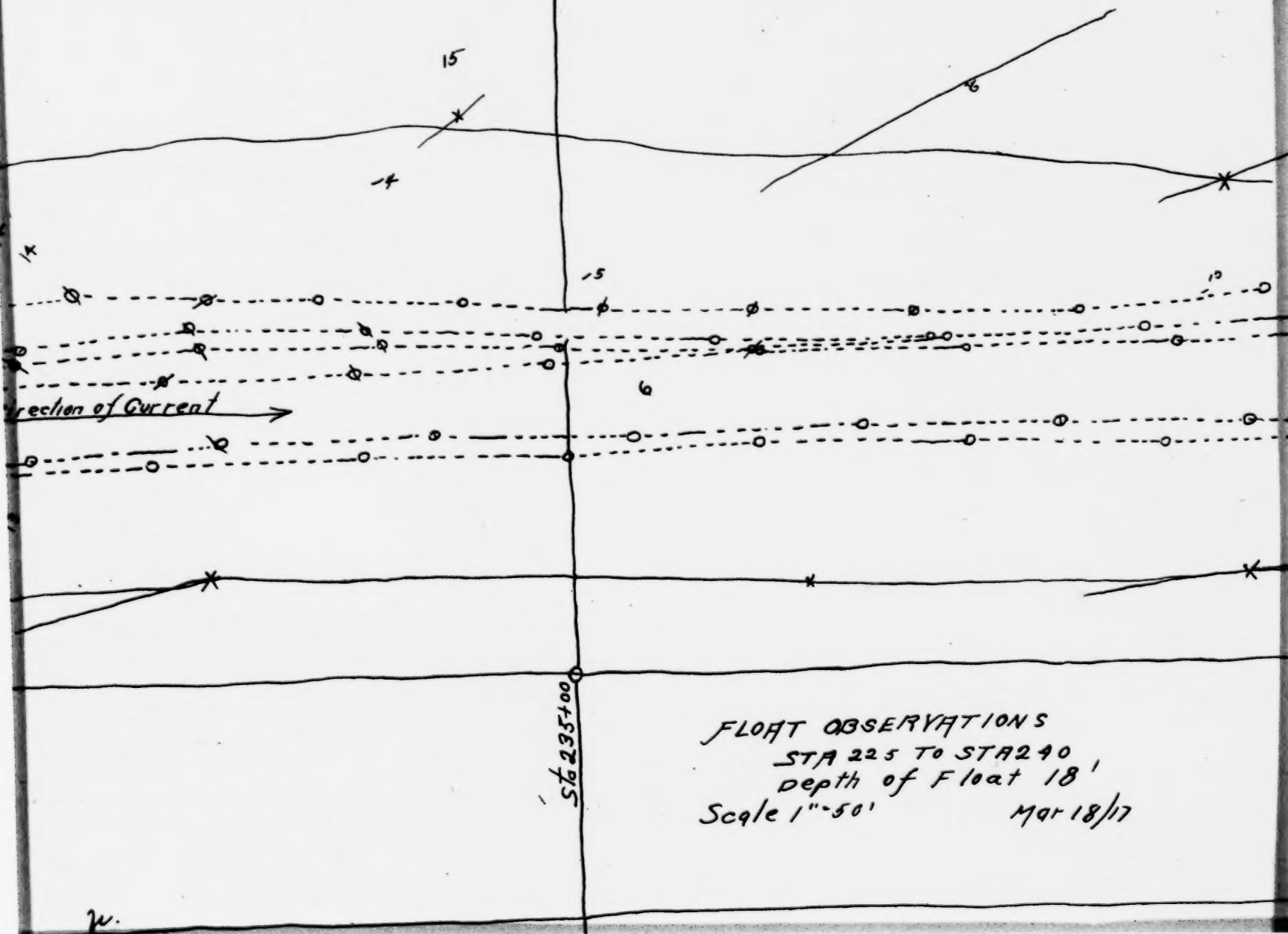
[The plan is marked as "Canal Company Exhibit 3."]

(Here follows diagram marked page 324a.)

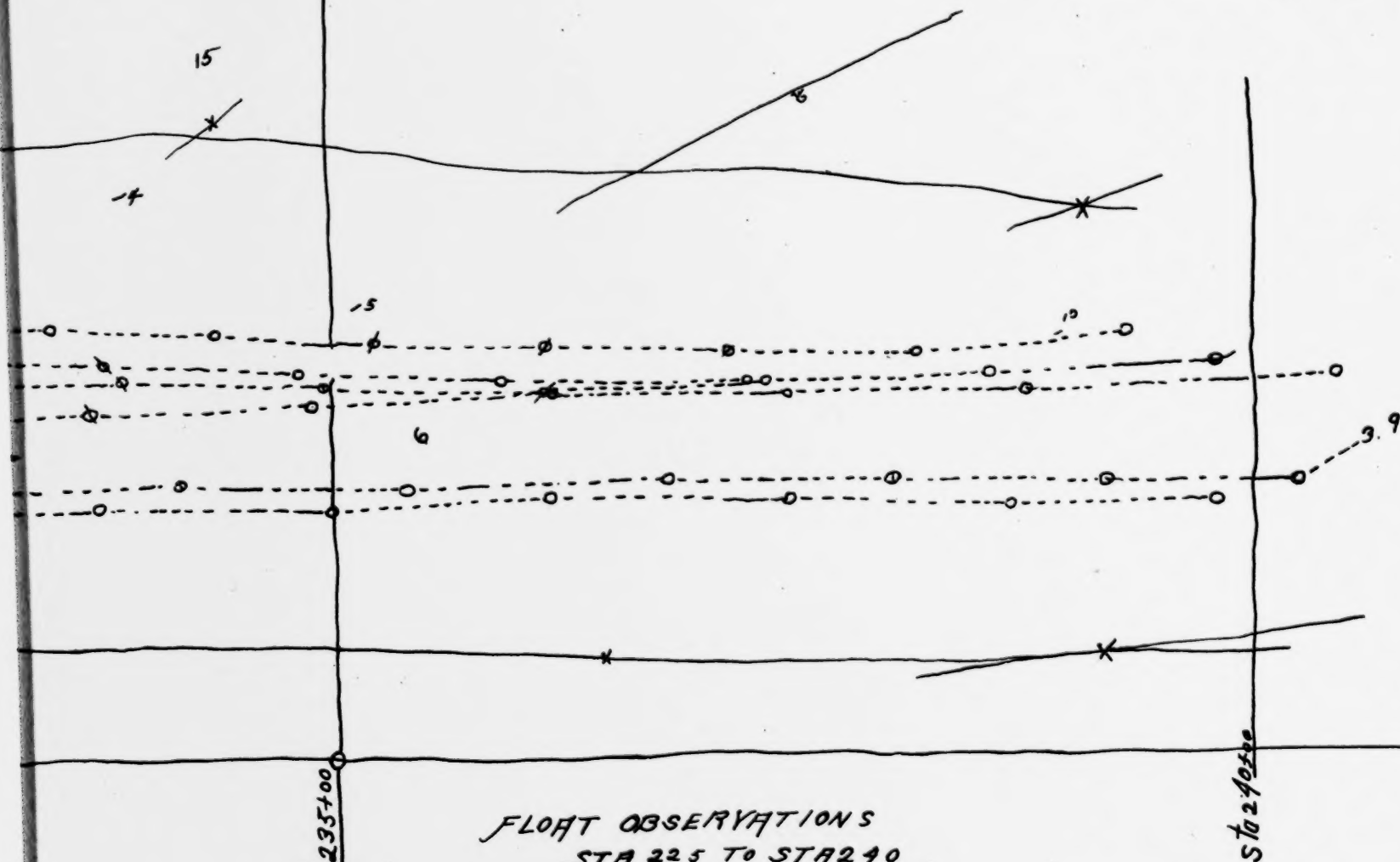


CANAL COMPANY EXHIBIT 3.

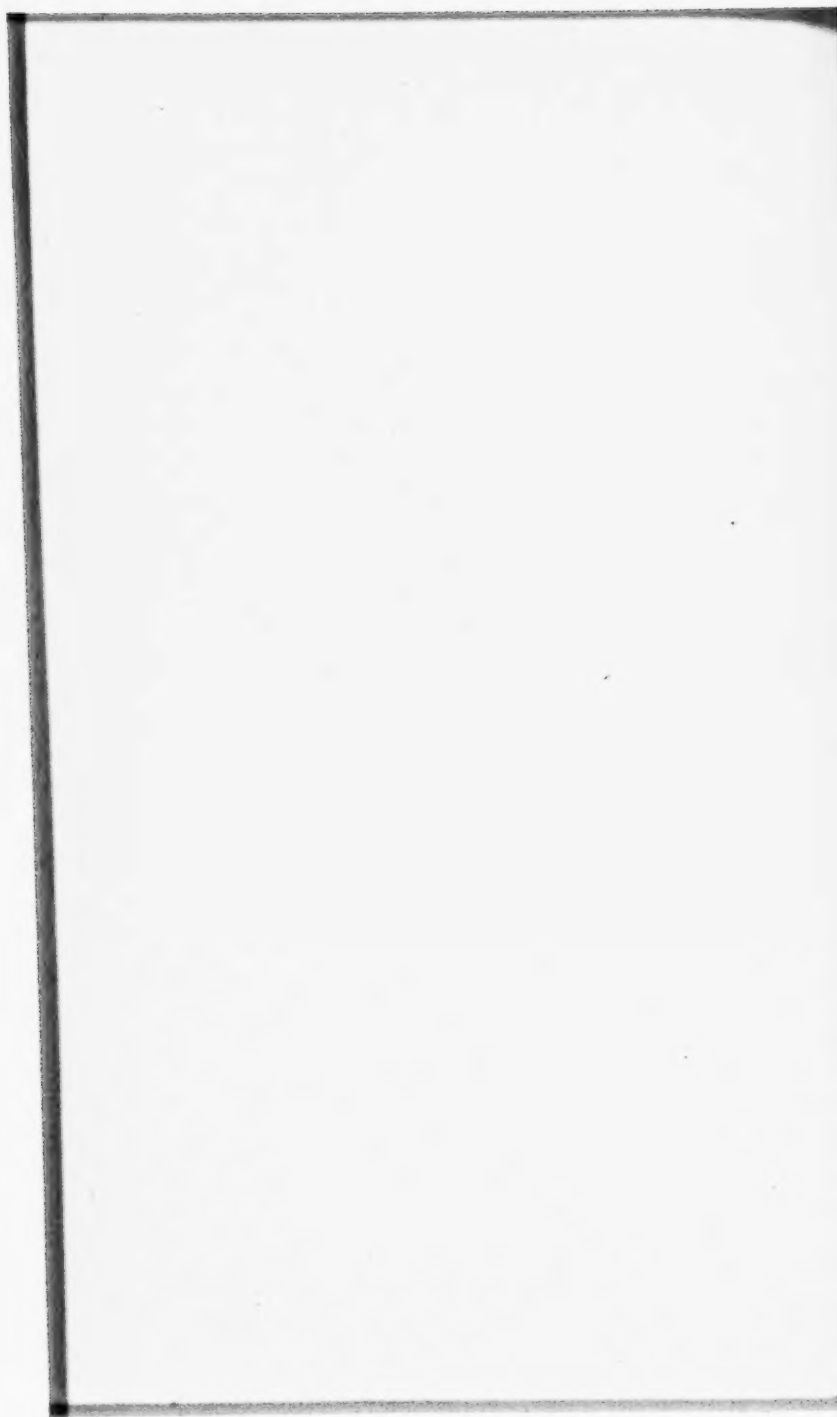
(Put in Evidence, page 324.)



324^a



FLOAT OBSERVATIONS
STA 225 TO STA 240
Depth of Float 18'
Scale 1"=50' Mar 18/17



Q. 31. The lines there, Mr. Dunbar, show the course of the float?

A. The lines show the course of the float.

Q. 32. Will you describe the plan?

The Court: Which is the north bank?

The Witness. This [indicating] would be the north bank, and this would be the south bank. These lines [pointing] indicate the water line at that time.

Q. 33. These lines indicate the water line?

A. Yes; the idea being to show what the actual width of the channel was,—the water in the channel,—so as to locate the float from that. These are the stations, marked "225," "230," "235" and "240." And this arrow indicates the direction of the current; and these are the actual paths of the successive floats.

Q. 34. That is, you tried it a number of times?

A. The operation was repeated six times, and every one of these marks indicates an actual location taken of the float.

Q. 35. Every 50 feet?

325 A. Approximately,—in some cases. And the float was located by the intersection of two transits from the banks of the canal. This cross is about the point where the Bay Port struck.

Mr. Blodgett: The scale of this is what?

The Witness: Fifty feet to the inch.

The Court: How do you account for that lane down the centre,—four on one side and two on the other?

The Witness: This lane here?

The Court: Yes.

The Witness: It was just a case of—in throwing over the floats, these were thrown over, you see, more that side. My idea in making it was to try to distribute the floats evenly over the whole area.

Q. 36. When you say "thrown over" you mean started over?

A. Yes; started over.

Q. 37. Which end were they started from?

A. They were started from some position back here [pointing], and we would commence to read as soon as we could get them in that position.

Cross-examination.

(By Mr. Blodgett:)

X Q. 38. Mr. Dunbar, you were in a small boat when you put over these floats?

A. I was on the shore. The floats were put over from a boat; yes.

X Q. 39. From a boat. And you were on shore?

A. I was on shore.

X Q. 40. Which shore were you on?

A. I was on the north shore.

X Q. 41. Did you have any instruments to take these with?

A. We had two instruments.

X Q. 42. And did you take them by instruments?

A. We took them by instruments—intersection of the two transits.

X Q. 43. Was the boat from which they were put over at anchor?

A. The boat was not at anchor; no.

X Q. 44. It was drifting with the current?

A. The boat was drifting with the current,—no, the boat was not drifting; the boat was running.

X Q. 45. The boat was running?

A. The boat was run eastward to some point well above station 225; and then the float was dropped over. The boat was run clear of it and kept clear of it.

X Q. 46. And where were you standing, at what station?

A. Why, about 230. I was at one instrument, and the instruments were at 230 and 235.

X Q. 47. 230 and 235. And what did you do,—just take the position that they were in in the stream at 230 and 235?

A. Oh, no, the readings were taken of the float with two transits every 20 seconds. There was a man at each transit and a man standing between us with a watch. Three seconds before the time was reached, the man with the watch would call "Ready," at the 20 seconds interval he would call "Ready," and the two men at the transits would take a simultaneous reading of the float. And this was repeated every 20 seconds throughout the course of the float.

X Q. 48. Will you just describe these floats?

A. The floats consisted of a piece of timber, I believe it was about a two by four; and there were two sets of vanes on it, one set about one foot,—perhaps it was two feet,—from the bottom; and the upper set about four or five feet from the water mark. And the float was weighted so it went to a depth of 18 feet.

X Q. 49. Did you have the float marked?

A. It was tested and marked.

X Q. 50. And what was at the bottom? Was this a straight stick of timber?

A. Straight stick of timber, with cross vanes, as I have described, and an iron weight.

X Q. 51. What do you mean by cross vanes,—a piece of wood running fore and aft?

A. A piece of wood running this way [indicating].—in both directions.

X Q. 52. In both directions. Where was that fastened?

A. That was fastened about two feet from the bottom of the timber and about four or five feet from the water mark.

X Q. 53. And how large was this timber?

A. The timber was about two by four.

X Q. 54. Were those all run through with the current?

A. All run through with the current.

X Q. 55. Where was this knuckle that you speak of,—
327 what section?

A. At about station 233; that is, the projection above the surface.

X Q. 56. It ran from about 230 to 235, did it not?

A. Yes, it was within that location.

X Q. 57. And it extended right out into the canal, did it not?

A. [Looking at a photograph submitted by Mr. Blodgett.] Why, that picture is evidently taken with the tide well up. Yes, at high tide it did extend out into the canal.

X Q. 58. And if you look at this picture, down by this post,—that post is supposed to be at the top of the prism, is it not,—that light-post?

A. Oh, no, not necessarily. That light-post may be well back from the prism.

X Q. 59. Where were the light-posts placed with reference to the prism?

A. The light-posts were placed with reference to the prism at various distances. They were supposed to be, if possible, spaced equally on both sides; but in many cases the slopes were out beyond the actual 100-foot prism; in fact, in most all cases.

X Q. 60. I am not talking of a 100-foot prism. A part of the prism is the slopes on the side,—one in two.

A. Well, the slope may be anywhere from one on one to one on five.

X Q. 61. At the point of this knuckle, the slope was not one in two, was it?

A. It might have been.

X Q. 62. Do you know?

A. I do not. It is a fairly steep slope. Probably not far from that.

X Q. 63. And the slopes, when the banks were supposed to be finished, were supposed to be one in two?

A. Theoretically, yes.

X Q. 64. And at the top of the rip-rap, at the top of these slopes, it was supposed to be 200 feet wide?

A. Well, if that theoretical slope was carried out, it would have been that.

X Q. 65. Then, as I understand you, that "theoretical slope," as you call it, which is according to the plans filed with the Massachusetts legislature, was never carried out in this locality?

A. Nor in any locality.

X Q. 66. Nor in any locality. Therefore, that canal has never, in any locality, been built according to those plans?

328 A. I should say it had been built according to those plans. X Q. 67. But not according to those slopes?

A. Everybody understands a plan of that type. No human being can expect you to cut a slope on a proposition of that size on an actual two to one slope. The plans were made and adhered to as closely as it was possible under the physical conditions. I should say the canal was constructed to the plans.

X Q. 68. Now, in the place between 230 and 235, on the north side, ever since the canal was built there had been a projection into the canal or into the slope of the canal?

A. Above low water.

X Q. 69. Above low water. Now, did you ever examine below low water to know whether it projected any down there?

A. I did.

X Q. 70. When?

A. August, 1917. And I have had a good deal of experience with that when the canal was cut through; I was superintendent of the dredging work at that time and at that point, and when the dredging was done and the channel was cut through there, I understand, as it has been in other points, it was run on the same ranges.

X Q. 71. And the channel has been left in this locality where the knuckle is, and the bank has been left in the same condition it was left at the time the canal was constructed?

A. That is, you mean,—the question is, that the bank is about the same now as it was—

X Q. 72. As it was when the construction was stopped?

A. I think it is practically the same.

X Q. 73. And had you ever heard from your navigators that, for some reason, in the vicinity of this knuckle it made the navigation of a loaded, deep-draft vessel difficult?

A. No, I never had.

X Q. 74. Never had. Now, you did not try this experiment going against the tide, did you, to note the deflection?

The Court: He couldn't, with a float.

A. I couldn't, with a float, against the tide.

X Q. 75. I say, you did not?

A. No, I did not,—impossible.

X Q. 76. You have never tried to take a vessel through against the tide and see whether it has any effect on her or not around this knuckle?

A. I have never taken any vessel through at any time.

Mr. Blodgett: I will offer this photograph, your Honor.

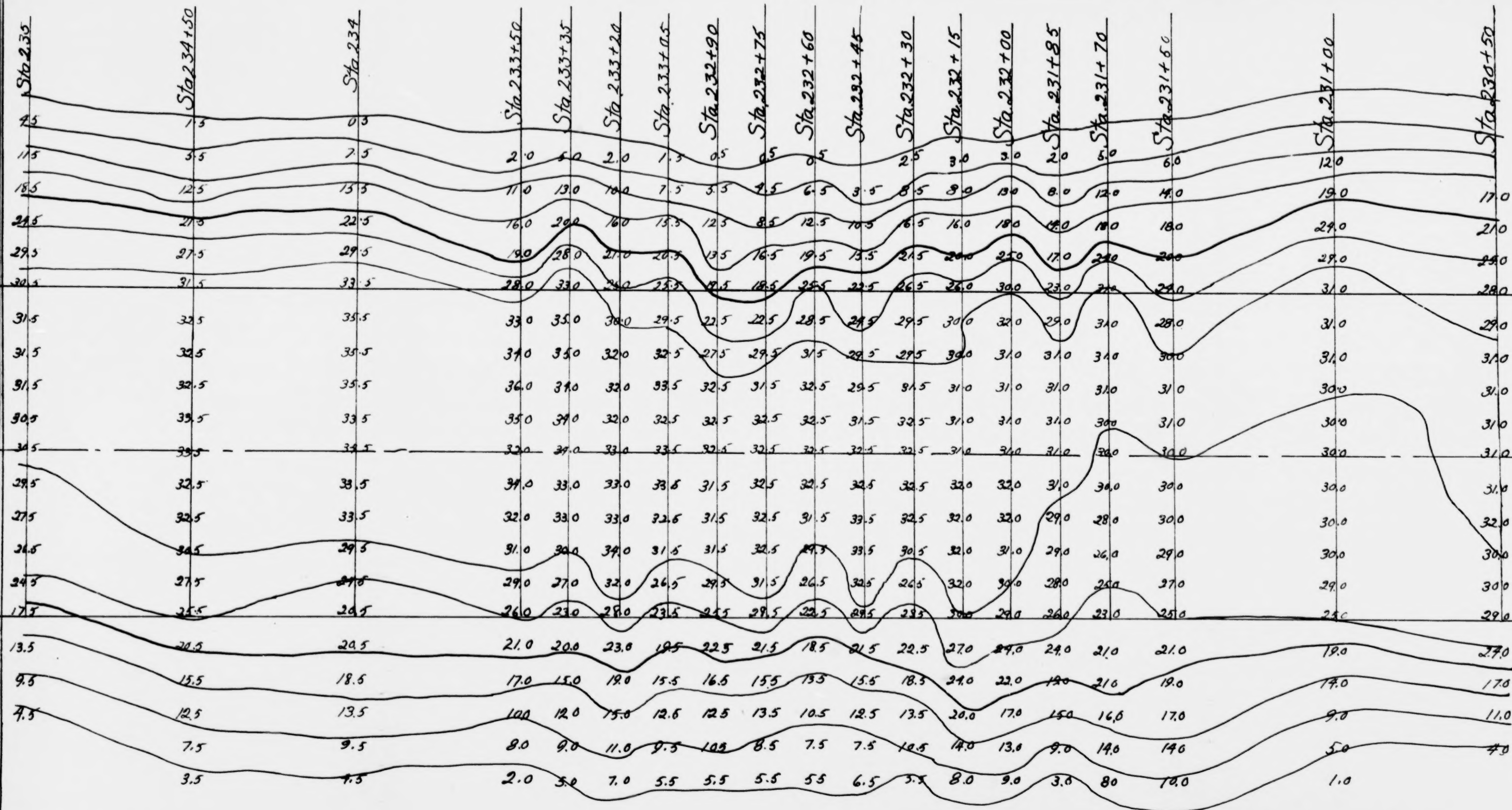
329 Mr. Pillsbury: Let me suggest, before you offer that, what we have spoken of, if your Honor is willing; and that is, that, rather than to attempt to put in photographs and descriptions, if your Honor would be willing to take a view of this locality, I think it would be of great assistance to your Honor.

The Court [after discussion]: I will think that over. I went through once last summer. Captain Rush of the Navy Yard took me through. I wanted to see this canal, and so I asked the Navy people if they would take me through, and they very kindly did so, so I am familiar with it more or less in a general way, and I will see how it develops. Perhaps we will stop here. Are you through with this witness?

Mr. Blodgett: No, not quite. Even though your Honor may take a view, I think I will have the photograph marked.

[The photograph is marked as "Bay Port Exhibit 9."]

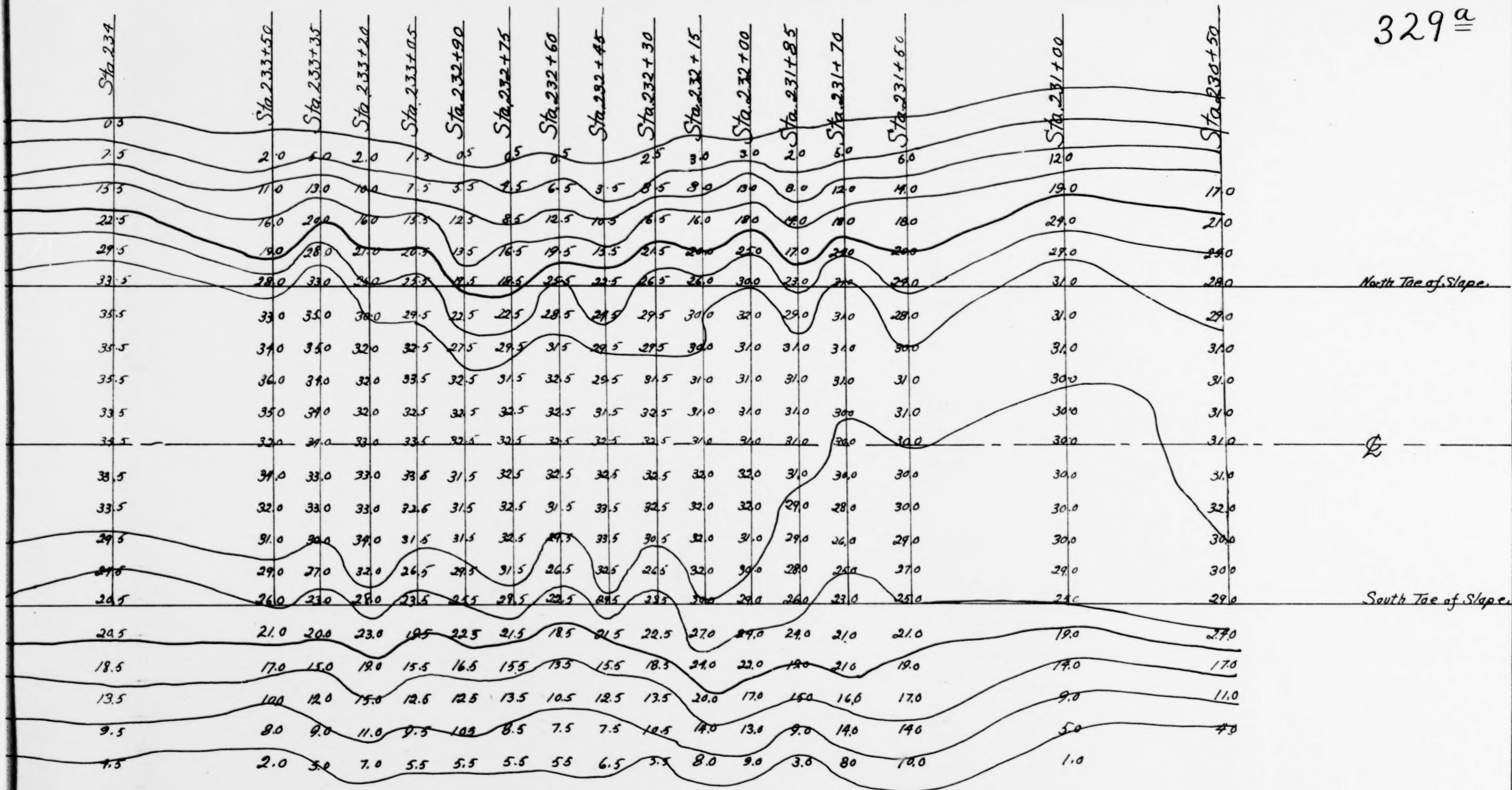
Adjourned to 10 a. m., Thursday, March 21, 1918.]



CANAL COMPANY EXHIBIT 4, Cases 1517 and 1518.
(Put in Evidence, page 329.)

Soundings Sta. 230+50 - 235
Depths at Mean Low Water Indicated.
Soundings Taken Aug 13 & 14, 1917 Scale

329^a



CANAL COMPANY EXHIBIT 4, Cases 1517 and 1518.
(Put in Evidence, page 329.)

Soundings Sta. 230+50 - 235
Depths at Mean Low Water Indicated.
Soundings Taken Aug 13 & 14, 1917 Scale 1"=20"



Boston, Mass., March 21, 1918.

Mr. Blodgett: I don't think I have any more questions, Mr. Dunbar and your Honor.

The Court: Any redirect?

Redirect examination.

(By Mr. Pillsbury:)

Q. 77. Mr. Dunbar, I showed you the blueprint of the soundings at this station 230?

A. Yes.

Mr. Pillsbury: But I do not think it was put in evidence. It was not marked, was it?

Mr. Blodgett: I don't know; I don't think so.

Mr. Pillsbury: Then I will offer it.

[The blueprint is marked as "Canal Company Exhibit 4."]

(Here follows diagram marked page 329a.)

Mr. Pillsbury: I think I showed this to your Honor yesterday.

The Court: No, I have not seen that.

Mr. Pillsbury: Will you please explain this, especially in relation to the south bank?

The Court: Which way are we looking?

The Witness: This is west and north, and this is south. The stations run from east to west.

330 The Court: Here is 230 plus 50,—and now we are going west.

Mr. Blodgett: There is 235.

The Court: She came down here and struck in here somewhere, and swung in against the bank, along here on the south bank. That is the 30-foot line?

The Witness: That is the 30-foot line; yes. These lines are every five feet.

Q. 78. Where do your soundings begin in relation to the top of the slope?

A. Why, they run about from low water.

Q. 79. They begin about low water?

A. Yes.

Q. 80. And run right straight across, as I understand?

A. Run right straight across.

Q. 81. Will you simply state, for the record, in a general way how those soundings run?

A. Why, the soundings run perpendicularly to the center line of the canal, and at intervals of working from the west the first four lines are 50 feet apart.

Q. 82. That is, the first four verticle lines, I suppose?

A. Yes. The soundings taken are at 10 feet apart; and all soundings have reference to mean low water at that point.

The Court: What is the rise and fall at that point?

The Witness: The rise and fall at that point would be about seven or eight feet under normal conditions.

Mr. Blodgett: Mr. Crocker said about four yesterday.

The Witness: At this point?

Mr. Pillsbury: Not at that point.

Mr. Blodgett: That is what he said.

The Witness: No; that would be, I would say, six.

The Court: Well, the rise and fall cannot be much more than four and a half and five feet in Buzzard's Bay?

The Witness: The rise and fall in Buzzard's Bay is probably about a mean of four and a half feet, and at Sandwich about ten feet; of course, they do get tides of twelve or thirteen; I have seen a tide of fourteen, but that is extraordinary.

The Court: What is the time difference for mean low water between Sandwich and Buzzard's Bay; is there a constant difference, or does it change?

331 The Witness: Between Sandwich and Buzzard's Bay?

The Court: Yes.

The Witness: Would you repeat that question?

The Court: What is the time difference between mean low water and mean high water between Sandwich and Buzzard's Bay?

The Witness: Buzzard's Bay is about three hours earlier.

The Court: Earlier than Sandwich?

The Witness: Yes. Could I be permitted to make a correction of a statement about the range?

Mr. Pillsbury: That is always a witness' privilege.

The Witness: Mr. Blodgett asked me about the range of tide at station 233, and I figured those tides out for both 165 and 233 from the tide curves, and I had the wrong point in mind when I answered. The tide, as near as I could figure, at 233 is about four and a half feet. At 165, which I was thinking of, that would be about 6.

Mr. Blodgett: That is what Mr. Crocker said yesterday, that it was four and a half feet.

The Witness: I was thinking of the other station.

The Court: At what state of the tide?

Mr. Blodgett: An hour ebb.

The Court: An hour ebb?

Mr. Blodgett: About an hour ebb.

Recross-examination.

(By Mr. Blodgett:)

X Q. 83. Mr. Dunbar, did you make any plan or blueprint similar to this showing the soundings from section 235 to 245?

A. Not that I recall.

X Q. 84. Did you make any examination of the bottom or any soundings back of 235?

A. Why, not with relation to this case; no.

X Q. 85. This blueprint, then, which is marked "Canal Company Exhibit 4" was made with reference to this case particularly?

A. It was; yes.

X Q. 86. With reference to the Canal Company's defence of this case?

A. Yes, sir.

X Q. 87. You have not made anything, then, to show the condition of the bottom or the depth of the water in the bottom of the canal between 235 and 245?

A. No, I have not.

332 X Q. 88. You have no records to show it?

A. Yes, I think that I have records.

X Q. 89. And you have always had access to the records, I suppose, there?

A. Oh, yes, sir.

X Q. 90. And how long have you known that between 235 and 245 there was a noticeable shoal where the water ran from 18 to 21 feet in depth?

Mr. Pillsbury: May I suggest this,—as it may shorten the case: I do not contend that the company did not know the condition

A. Why, yes, I should suppose they would secure a tug alongside, make her fast in case of the ship floating, and a tug go ahead of her and keep her in there.

Q. 18. In the event of that being done, would you have the tugs facing the same way the ship is facing?

A. Well, it would not be altogether necessary, but that would be the most reasonable way. A tug can go astern as well as she can go ahead.

Q. 19. And how should the tugs be arranged in relation
335 to the ship, assuming that you have three tugs available?

A. Well, I should say two would be sufficient,—have one at each end of her.

Q. 20. One at each end of her?

A. If there was water sufficient at the bow of the ship to float the tug.

Cross-examination.

(By Mr. Park:)

X Q. 21. Captain, where were you born?

A. I was born in Nova Scotia, sir.

X Q. 22. Have you been master of steamtugs?

A. Sir?

X Q. 23. Have you ever been master of steamtugs?

A. No, sir.

X Q. 24. Are you familiar with the Cape Cod Canal?

A. No, sir.

X Q. 25. You knew where the Bay Port first struck on the 13th of December?

A. No, sir.

X Q. 26. Do you know whether there is anything on the banks to which you can make an anchor fast?

A. No, sir.

X Q. 27. Do you know the weight of the Bay Port?

A. No, sir.

X Q. 28. Do you know the size of her anchors?

A. No, sir.

X Q. 29. Do you know what cables or hawsers or lines she had?

A. No, sir.

X Q. 30. Do you know what size of anchor and how many anchors it would be necessary to have to hold her in her position after she was stranded?

A. I do, sir.

X Q. 31. How many?

A. One.

X Q. 32. Where would you put that anchor on the shore?

A. I would put it any place on the shore, in from the beach a little ways.

X Q. 33. What size of anchor?

A. A very small anchor would be sufficient to hold the Bay Port or a larger ship than she.

X Q. 34. Do you know how the Bay Port was stranded on the shore?

A. I understood she had run on the shore bow first.

X Q. 35. Bow first?

A. Yes, sir; and swung up to the side,—to the shore.

X Q. 36. Do you know what part of her was on the bottom?

A. From what evidence I have heard here, that is all I know.

X Q. 37. All you know about it is what you have heard here?

A. Exactly, sir, and what I know about the stranding of the ship.

X Q. 38. You know very little about it?

A. Except what I have heard.

336 X Q. 39. Have you ever had a vessel 265 feet long, loaded with around 2,500 tons of coal, that has been hung up on her starboard bilge on stone, and secured her in that position with one anchor to the shore; and, if so, what vessel and state all the circumstances?

A. I have never been shipwrecked many times in my life, but one time I was shipwrecked.

X Q. 40. Your ship ran ashore?

A. Yes, she ran ashore; but it was not necessary to put anything out to hold her, because she came off.

X Q. 41. Did you ever experiment with putting out an anchor in a position the same as the Bay Port was in on the 13th of December, 1916, to see if an anchor would hold her?

A. Yes, sir.

X Q. 42. When and where?

A. In a place called the Oakland Creek in California. I was laid up there one winter in a steamship which had run to Alaska. A gale of wind came on, and she blew from the anchors and blew across the channel upon the bank on the opposite side.

X Q. 43. Were the sides of that channel made of stone rip-rap?

A. No, sir; it was mud.

X Q. 44. Was it sloping?

A. Partly.

X Q. 45. Partly.

A. Well, it was not steep; it was a gradual slope.

X Q. 46. Mostly mud?

A. Mud; yes. And so the thing wouldn't happen again. I took an anchor ashore and put it into the—dug a hole and put it in the mud, and packed it up with stakes and run a heavy hawser to it. About three weeks after that we got another gale of wind from the opposite direction, and she swung clear, and that anchor and cable held her.

X Q. 47. Was she on an even bottom at the time you put out that anchor?

A. Yes, sir.

X Q. 48. And she remained on an even bottom all the time?

A. Yes.

X Q. 49. Did you get any other anchor and cable out upon the other side?

A. No, sir.

X Q. 50. Only just that one?

A. It was miles across to the other side.

337 X Q. 51. And you put out that anchor so if she went afloat she would be anchored, so you could hold her there somewhere?

A. Yes, sir; exactly.

X Q. 52. That was the purpose?

A. Yes, sir.

X Q. 53. It was not done for the purpose of keeping her on an even keel?

A. No, sir.

X Q. 54. But so she wouldn't slide off?

A. Yes, so she wouldn't get away again.

X Q. 55. That is, if the high tide came, and she floated, so you could keep hold of her, keep her there somewhere?

A. Exactly.

X Q. 56. And for no other purpose. Have you ever engaged as salvor or wrecker in any professional operations?

A. No, sir.

X Q. 57. Did you ever work for any salvage associations or companies?

A. No, sir.

X Q. 58. Do you know anything about the Bay Port except what you have heard here?

A. Not a thing.

X Q. 59. And you have had no experience on tugboats?

A. No, sir.

Mr. Park: That is all.

Mr. Blodgett: Nothing.

Mr. Pillsbury: That is all, captain.

JOHN J. COAKLEY (sworn).

(By Mr. Pillsbury:)

Q. 1. What is your full name, Mr. Coakley?

A. John J. Coakley.

Q. 2. And your occupation? You are the treasurer of the Canal Company, are you not?

A. I am; yes, sir.

Q. 3. And live in New York?

A. Yes, sir.

Q. 4. How long have you been treasurer of the Canal Company?

A. Since 1909.

Q. 5. In the fall of the year 1916 or the late summer of 1916, did the matter of the licensing of the canal pilots come up with the United States Government?

A. It did.

Q. 6. Was there some correspondence with the Government in relation to it?

A. Yes, sir.

338 Q. 7. Will you produce, please, the letter which you received from them; or, if more than one, the letters?

A. Letter dated August 22, 1916 [producing the letter].

Q. 8. From whom to whom?

A. From the Acting Supervising Inspector General at Washington, in the Steamboat Inspection Service, to Mr. J. W. Miller, Vice-President of the Boston, Cape Cod & New York Canal Company.

Q. 9. That is Commodore Miller, is it not?

A. Yes.

Q. 10. By the way, he is now dead, is he not?

A. Yes, sir.

Q. 11. How recently did he die?

A. He died on March 8, I think, this current year.

Mr. Pillsbury: Let me have that letter, please. This is a letter of August 22, 1916, addressed to Commodore Miller——

Mr. Blodgett: Just a minute. How is it admissible?

Mr. Park: How is it admissible? What is the object of it?

Mr. Pillsbury: Do you object to it?

Mr. Blodgett: I don't know; I have never seen it; I don't know anything about it.

Mr. Park: What is the purpose of it?

Mr. Pillsbury: I am going to put in some other letters. I wish to show that these men on the canal have licenses from the United States Government——

Mr. Park: We admit it.

Mr. Pillsbury: The purpose is, to show the circumstances of their leaving the employ of the Canal Company and becoming United States licensed pilots, it being my intention to show that the Government stated that they were exercising jurisdiction in waters which were under the control of the United States and should be United States licensed pilots.

Mr. Blodgett: That does not make them not in the employ of the Canal Company.

Mr. Pillsbury: Well, I shouldn't suppose it would, but I shall show that they were not after that time.

The Court: I will allow you to show what the facts were in reference to the licensing of pilots by the United States. I do not know how far it gets on the real question that you are leading up to.

339 Mr. Pillsbury: I do not care to put in the letters if it is better to do it in another way.

The Court: I really question whether you can prove it by simply putting in letters.

Mr. Pillsbury: I think they have all testified they were licensed by the United States.

Mr. Blodgett: We do not question that they had a pilot's license from the United States.

Mr. Park: No.

Mr. Pillsbury: I am not attempting to prove that fact; I am merely showing what led up to it.

Mr. Blodgett: They also testified they had licenses from the Cape Cod Canal.

which has appeared in evidence. That may shorten Mr. Blodgett's examination.

Mr. Blodgett: All right; that is all I want.

The Court: You said Buzzard's Bay tide was the earlier?

The Witness: Buzzard's Bay is about three hours earlier.

The Court: And the mean rise and fall is about 10 or 12 feet at Sandwich, or 9 or 10,—which did you say?

The Witness: I should say 10 feet at Sandwich and about four and a half at Buzzard's Bay.

X Q. 91. Mr. Dunbar, at 243—there was a blueprint put in when Mr. Crocker was on the stand, marked "Bay Port Exhibit 1," which shows the centre line through Section 241 to 242. Do you have any blueprint showing the other soundings in that section, 241 to 242?

A. At that time, you mean?

X Q. 92. Yes.

A. Why, not that I know of. You see I was not——

X Q. 93. November 20, 1916.

A. I had no connection with the canal at that time; and all I know of is having seen that print.

X Q. 94. Mr. Crocker testified, as I understand, that he had made other soundings there which do not appear here. Have you got any records showing what those soundings were, in any blueprint?

A. Well, I couldn't say. If Mr. Crocker says they were taken and were there, they are no doubt in the office.

Mr. Pillsbury: There are not any others in the office that we could find, Mr. Blodgett.

Mr. Blodgett: I only spoke of what Mr. Crocker said.

333 Mr. Pillsbury: We have had a search made and there are not any. I think that was brought out in connection with his examination. That is all, Mr. Dunbar.

S. A. KIDSTON (sworn).

(By Mr. Pillsbury:)

Q. 1. What is your full name, captain?

A. S. A. Kidston.

Q. 2. Where do you live, captain?

A. New York.

Q. 3. What is your present employment?

A. I am not employed just at present; I am on sick leave.

Q. 4. What?

A. I am a master mariner,—that is my present profession.

Q. 5. You are on sick leave?

A. Yes.

Q. 6. You are a master mariner?

A. Yes, sir.

Q. 7. What has been your training and experience?

A. I have been going to sea for about 38 years.

Q. 8. And in what waters and with what vessels? I do not want you to name them all, but merely in a general way.

A. Steam and sail, all parts of the world.

Q. 9. You have no connection with the Canal Company, have you?

A. No, sir; none whatever.

Q. 10. You never have had?

A. Never have.

Q. 11. Captain, you have been here during most of the evidence, have you not?

A. Yes, sir.

Q. 12. And you have heard the description of the witnesses of the way the Bay Port struck the south bank on the 13th and the way she lay on the bank until the time that she floated off on the 14th?

A. Yes, sir.

Q. 13. And you have heard the evidence in relation to what was done about pumping water out of her, up to the time she floated, and the lightering of some coal out of her?

A. Yes, sir.

Q. 14. Captain, I want you to tell me if there are any well recognized means of securing a vessel in the position that she was, so that in the event of her floating she will be under control?

Mr. Park: Is this a sufficient qualification, your Honor,—a man that has been a navigator but has not been engaged in salvage operations of vessels in distress, which require particular skill and particular knowledge?

The Court: I should not think that he did show particular knowledge in reference to salvage operations, but at the same time he understands in a general way the instrumentalities that are used by vessels,—enough so that I should think he could express an opinion.

Mr. Park: The objection may go to the weight of the testimony.

The Court: It goes to the weight rather than to the admissibility.

Mr. Pillsbury: And, of course, the evidence is directed to the obligation of the captain of the ship, as well as the salvage company, at the time of the grounding, as to any precautions that should be taken to prevent the happening of what did happen.

The Court: Yes, you may put the question.

Mr. Pillsbury: Now, captain, you may answer.

A. You mean as to securing her so she wouldn't go afloat without they were prepared to let her float?

Q. 15. Well, so that when she did float she would float in safety, —I will put it that way.

A. Well, secure her to the bank, to the shore, by hawsers,—by anchors; get an anchor ashore,—get a hawser ashore if there is anything to make it fast to,—put an anchor ashore.

Q. 16. How would the anchor be secured ashore?

A. By just digging a hole and putting it in the ground.

Q. 17. Now, is there any way, where you have tugs available in a situation of that sort, to handle the tugs so that they would be of assistance in the event of an unexpected floating?

Mr. Pillsbury: I beg your pardon.

Mr. Blodgett: Mr. Park asked one of them, and he said yes.

Mr. Pillsbury: I am very sure you are wrong. Which one was it?

Mr. Blodgett: It was Captain Lewis, in Mr. Park's cross-examination.

Mr. Pillsbury: I will stake my memory against Mr. Blodgett's as to the testimony. But in order to clear it up I will later call Mr. Lewis. I am entirely sure that is not the fact.

Q. 12. Mr. Coakley, did the Canal Company issue any licenses to any pilots after the Government required them to have United States licenses?

A. No, sir.

Q. 13. Now, when was it that the Government made the requirement that they should be Government pilots?

Mr. Blodgett. When did they issue the pilots' licenses?

Mr. Pillsbury: No; I want to show when they made the requirement.

Mr. Blodgett: I object to his testifying when the Government made the requirement.

The Court: When was he informed that the Government made that requirement? Put it in that form.

Q. 14. When were you informed that the Government required these pilots should be Government pilots?

A. On August 28, 1916.

Q. 15. That is all as to that. Were you present at a meeting of the pilots after that date?

A. Yes, sir.

Q. 16. When they organized an association?

A. Yes, sir.

Mr. Blodgett: I don't think you ought to put it that way. The pilots have said he was down there, and I think you ought to ask him what was done.

Mr. Pillsbury: I am going to ask him that, if you will give me a chance, Mr. Blodgett.

Mr. Blodgett: I think that question and answer ought to be stricken out in that form, because it is not right for the record.

The Court: Perhaps it makes an admission.

Mr. Pillsbury: Well, I will say, when they purported to organize an association.

Mr. Blodgett: Ask him what they did.

Mr. Pillsbury: I will, if you will give me a chance.

Q. 17. What was the date of that meeting?

A. It was about September 28, 1916.

Q. 18. And where was it?

A. At Buzzard's Bay.

Q. 19. Who were present?

A. Captain Lewis, Captain Rochester and I think Captain Bertsche,—there was a third captain there.

Q. 20. There were three pilots. Were you present?

A. I was there, and I believe Mr. Maass was there, for a time anyhow.

Q. 21. Now, tell us what took place.

A. The clerk was also there,—Mr. Checker.

Q. 22. Now, will you tell us what took place; what they did?

A. Well, prior to the—

Mr. Blodgett: If there are any records, I think the records ought to be produced.

Q. 23. Let me have that record signed by Mr. Rochester, will you?

[The witness produces the record referred to.]

Mr. Pillsbury: I produce a record signed by Mr. Rochester.

Mr. Blodgett: I don't know what that is or anything about it; it is a carbon copy.

341 Mr. Pillsbury: It is produced in reply to your question.

Mr. Blodgett: No, that isn't a record.

Mr. Pillsbury: It is headed "Minutes." I don't know what a record is if it isn't minutes.

The Court: It is not a thing that lies in the record at all. You may go right ahead and let him tell what took place.

Mr. Pillsbury: I shall be glad to put this in, because I do think it is convenient.

The Court: It is only admissible as corroborative evidence.

Q. 24. Mr. Coakley, will you go ahead and state what took place?

A. Well, I was at the canal that day on business of the Canal Company, in company with Commodore Miller and the secretary, Mr. Maass, and during the course of the day Captain Lewis spoke to me. It appears he had received a letter from Commodore Miller telling him—

Q. 25. I suppose you are not allowed to testify as to what he said about having a letter. Let us get right down to the meeting. In consequence of what he said to you, there was a meeting held, was there?

A. Yes, sir.

Q. 26. At which you were present?

A. Yes; we met that afternoon about five o'clock.

Q. 27. And what took place at the meeting?

A. The pilots, the three men, were anxious to get down to a working basis as to how they should proceed with their new duties. Not being lawyers or men of clerical experience, they were up in the air and much excited about it, so I offered to assist them in any way I could to organize and told Captain Lewis that if he would keep cool and not get excited I would go into the meeting with them and help them all in my power to organize as best they could so they would know where they stood as regards their future operations. The meeting was held about five o'clock in the evening, as I remember it,—it was delayed somewhat until the third pilot could be present, who at the moment was asleep,—he had been on the night shift the

night before, and they wanted him present, and we waited until he arrived. Then the pilots held their meeting. The articles of association, if it may so be termed, which had been drafted
342 with my assistance before the meeting took place, were then submitted to the three pilots and approved by them.

Q. 28. Have you got a copy of those articles?

A. I have.

Q. 29. Will you produce it, please?

[The witness produces a copy of the articles of association, which is passed to Mr. Blodgett by Mr. Pillsbury.]

Mr. Pillsbury: I will offer this.

[The copy of the articles of association is marked as "Canal Company's Exhibit 5."]

Mr. Pillsbury: It is very short. Perhaps I will read the material parts.

[Mr. Pillsbury reads from the articles of association as far as to the words "to be paid from the earnings each month."]

Q. 30. Was that fixed at that time?

A. No, sir; not at the moment.

[Mr. Pillsbury resumes and completes the reading of the articles of association.]

Q. 31. Now continue, please, with your account of the meeting.

A. Well, there is not much more that happened at the meeting, except that the pilots in session elected Captain Geer as their manager, and passed, I believe, a resolution authorizing his drafts on the National Wareham Bank against the funds of their association. A signature card was to be placed with the bank; and, as I recollect, there wasn't very much more happened at the meeting.

Q. 32. That is as much as you recall of the meeting?

A. At the present moment; yes.

Q. 33. Will you refresh your memory to this extent: Did Captain Geer state it was agreeable to him to be manager?

A. Yes, I remember that.

Q. 34. And did he state that if, in the absence of a regular pilot or if they were all busy, and he had to pilot a boat through the canal, he, at the end of the year, should receive payment for services rendered out of the surplus left in the bank?

A. Yes, that did happen. I recall that now distinctly, Captain Geer himself coming into the meeting later, after he was elected manager, and stating that there might be occasions when the
343 pilots would all be busy, and there would be an extra boat or steamer come along, and as he had a Government license he was qualified to take it through, and he felt that, while he would not insist upon it or make a point of it, if there was a large surplus in the bank they ought to compensate him for his services as pilot in taking trips of that nature.

Q. 35. Do you recall this, that Captain Lewis suggested that a room be opened at Sandwich in the collector's office, where the pilots, finding themselves with no means of getting back to Buzzard's Bay, might sleep?

A. Yes, that was brought up, and Captain Geer stated at the time that that could be arranged very easily.

Q. 36. Do you recall that they asked you to have these articles of association taken up with some New York lawyer and drawn up in legal form?

A. Well, I don't think that they asked me to do it; but there was a question there whether these proposed articles of association were in legal form or not, and I stated: "Well, I will bring them to New York, or send me a copy of them and I will have them gone over by some lawyer and whip them into shape if they are not in proper shape now."

Q. 37. Was anything, as a matter of fact, done in the way of changing them?

A. No, sir.

Mr. Pillsbury: I will now offer the minutes of the meeting, Mr. Blodgett having called for them and having examined them.

[The minutes of the meeting are marked as "Canal Company Exhibit 6."]

Q. 38. Now, Mr. Coakley, at what time, if at all, did the men who had been acting as pilots of the canal cease to be in the employ of the Canal Company?

A. September 8, 1916.

Q. 39. That was previous to this meeting, was it?

Mr. Blodgett: What was that answer?

The Witness: September 8, 1916.

Q. 40. Since that time have any of the men who have been acting as pilots been in the employ of the Canal Company?

A. No, sir.

Mr. Pillsbury: I will offer a certified copy of the certificate of incorporation of the Cape Towing Corporation, from which it appears that that corporation was organized on the twenty-sixth day of August, 1916, under the laws of the State of Delaware.

344 [The certified copy of the certificate of incorporation of the Cape Towing Corporation is marked as "Canal Company Exhibit 7."]

Q. 41. After the formation of the Cape Towing Corporation, were certain agreements made between the Canal Company and it?

A. There were.

Q. 42. One on the eighth day of September, 1916? Is that one of the agreements [passing the witness a paper]?

Mr. Blodgett: What agreement is that?

Mr. Pillsbury: That is the eighth day of September, 1916.

Q. 43. That is in relation to tugs?

A. Yes, sir; this is the agreement between the Canal Company and the Cape Towing Corporation.

Q. 44. And what does that agreement relate to?

A. It relates to the charter and operations of the tugs John C. Stuart, Hazelton and tug Pallas.

Q. 45. The Stuart and the Hazelton are in this case, and the Pallas—

A. The Pallas has since passed out.

Mr. Pillsbury: Unless it is desired, I won't read this now. It is a charter to the Cape Towing Corporation, is it, of these tugs?

The Witness: It is a tug charter,—that is, a recharter of the Stuart and the other two tugs by the Canal Company to the Towing Company, practically.

Q. 46. Referring to the tug Dalzelline, was there any agreement in relation to that made in September—

A. Yes, sir.

Q. 47. —between the Canal Company and the Cape Towing Corporation?

A. No, sir.

Q. 48. Oh, this agreement is between the Dalzell Company and the Cape Towing Company?

A. Yes, sir.

Q. 49. That is dated the 29th of September, 1916?

A. Yes, sir.

Q. 50. And is a charter of the tug Dalzelline from the owners, the Dalzell Company, to the Cape Towing Corporation?

A. Yes, sir.

Q. 51. The Dalzelline had always been owned by the Dalzell Company, had she not?

A. As far as I know.

Q. 52. She has never been owned by the Canal Company?

A. Oh, no.

Q. 53. Or controlled by it?

A. No, sir.

345 Mr. Pillsbury: I will have both of these marked.

[The two papers are marked, respectively, as "Canal Company's Exhibits 8" and "9."]

Q. 54. Now, referring to the tugs Hazelton and Stuart, has the Canal Company, since the date of this charter, operated them in any way?

A. No, sir.

Q. 55. Was Mr. Geer the manager of the Cape Towing Corporation?

A. So I was informed; yes, sir.

Q. 56. And in that capacity directed the movements of the tugs?

A. I think so; yes, sir.

Mr. Blodgett: I don't think he can testify as to that, can he?

Q. 57. Well, in any event, you can testify that the Canal Company did not do it? He had nothing to do with the tugs in his capacity as superintendent of the canal, did he?

A. No, sir.

Mr. Park: I object to that. Mr. Geer will be a witness—he will testify.

Mr. Pillsbury: He is to be called by you?

Mr. Park: He will be, on your failure to produce him.

Mr. Pillsbury: Well, perhaps I will produce him if he is here.

Mr. Park: He will be here.

Q. 58. Mr. Coakley, when did Mr. Geer leave the employ of the company?

A. Early in 1917; I think it was the end of January, or February.

Q. 59. Mr. Colbeth has been superintendent of the company since?

A. Yes. I think, refreshing my memory, since the 15th of February—I believe—1917.

Q. 60. I think, in my examination, you started to state what took place in relation to this Pilots' Association before this formal meeting that you testified about?

A. Yes.

Q. 61. And I interrupted you and directed your attention to the meeting?

A. Yes, sir.

Q. 62. Will you now state what you were going to say about that?

A. Well, before—during the day—

Q. 63. I did not have so much in mind the particular day, but had this association been in the air for some time before this
346 meeting?

A. Yes, sir; and when we arrived at the Cape, Captain Lewis spoke to me about the new procedure.

Q. 64. I think you have already testified to that.

A. And he was, as I might term it, very much excited and up in the air about it. Commodore Miller had written from New York that they were to do certain things; and he said to me that he was not going to be dictated to by New York; and if they were going to form their pilots' association, they would form it on their own plan, their own lines—words to that effect. And I told him at that time to keep cool and not get excited, especially as the commodore was around; and after our business was done for the day, I would meet the pilots and help them in any way that I could to get on a working basis.

Q. 65. You say that this matter of a pilots' association had been in the air some time before this formal meeting?

A. Yes; for about a month there had been correspondence and—

Q. 66. Now, in the first part of September were notices sent out to your—I will term it to the "shipping trade" in general as to what was being done in relation to the pilots and the Cape Towing Corporation being formed?

A. Yes, I believe there were.

Mr. Pillsbury: Will you produce those notices, Mr. Blodgett?

Mr. Blodgett: What notices?

Mr. Pillsbury: The ones relating to the Pilots' Association and the Cape Towing Corporation which I think were sent out about the first of September, 1916.

Mr. Blodgett: None were received by our clients.

Mr. Pillsbury: Well, were any received by the agents of your clients, your brokerage firm?

Mr. Blodgett: No, neither one. We have some letters that we got from the Chamber of Commerce after the accident. If you want those produced, I will produce them.

Mr. Pillsbury: You know perfectly well that I did not ask for those, Mr. Blodgett. We may come to them later.

Q. 67. Were these notices sent to either the White Oak Transportation Company or their shipping agents?

A. They were.

Q. 68. What?

A. They were, according to our mailing list.

347 Q. 69. Was there more than one notice?

A. I think that is the only one.

Q. 70. This [referring to the one indicated by the witness] relates to the Pilots' Association. Was there another one in relation to the Cape Towing Corporation at any time, do you recall?

A. This was a notice from the Canal Company to the patrons of the canal [producing a paper].

Q. 71. Yes. Now, any other?

A. There are no others.

Q. 72. I have found the one I had in mind, I think. Is not that the one relating to the Cape Towing Association [passing the witness a paper]?

A. Yes—yes, sir; that is the towage schedule.

Mr. Pillsbury: I will offer these, the first being dated September 1, 1916—

Mr. Blodgett: Signed by whom?

Mr. Pillsbury: This one is signed "William Lewis" and "George G. Rochester," and there is another one of the same date that you may mark. This is the first one and it is the one signed by Rochester and Lewis.

[The paper is marked as "Canal Company Exhibit 10."]

Mr. Pillsbury: Here is another one of the same date, signed by J. W. Miller, vice-president of the Canal Company.

[The paper is marked as "Canal Company Exhibit 11."]

Mr. Pillsbury: Here is one dated the 8th of September, signed by the Boston, Cape Cod & New York Canal Company.

[The paper is marked as "Canal Company Exhibit 12."]

Mr. Pillsbury: Mr. Blodgett, have you the checks which were given in payment of the tows and pilotage?

Mr. Blodgett: We have got the bills.

Mr. Pillsbury: Of the first trip or any previous trip of the Bay Port through the canal?

Mr. Blodgett: We have some bills here. From whom do you mean, Mr. Pillsbury?

Mr. Pillsbury: Whatever bills you received for the pilotage at any time or any towage, if there were any.

Mr. Blodgett: Here is a Bay Port one dated November 24th, and one dated December 15th from the Cape Towing Company.

348 Mr. Pillsbury: I am speaking of the previous trips. I understand the Bay Port had been through the canal at least once before, and I want the bills in relation to that trip. Have you got the check which paid that bill?

Mr. Blodgett: I don't think so.

Mr. Pillsbury: I ask for the checks and bills.

[Mr. Blodgett passes a bill to Mr. Pillsbury.]

Mr. Pillsbury: It is agreed this bill was paid, is it?

Mr. Blodgett: Surely—the bill is receipted.

Mr. Pillsbury: This bill is dated November 24, 1916, "Crowell & Thurlow, Boston, Mass. to Cape Pilots Association, Dr." and is for a trip of the Bay Port on the 24th of November, 1916, west bound, for \$12, which was paid. That is the previous trip of the Bay Port through the canal, when she went through light on the 24th of November.

[The bill is marked as "Canal Company Exhibit 13."]

Mr. Pillsbury: Have you the bills for the earlier trip which the Bay Port made through the canal?

Mr. Blodgett: The only one we have got is the one we have given you.

Mr. Pillsbury: She made another trip before this—March, August and November—she went through three times.

Mr. Blodgett: These are the only ones we have. The bills came—there is no question about that—and we paid them.

Mr. Pillsbury: That is all I wanted to show. The bills came in the same form as the one which has been put in, and were paid—is that right?

Mr. Blodgett: Surely.

Mr. Pillsbury: The Bay Port went through three times before this, in March, August and November, 1916?

Mr. Blodgett: I would like to look that point up to be sure, your Honor, before I agree to that.

Q. 73. Mr. Coakley, can you tell us whether those bills were paid?

A. I can by the records there.

Mr. Blodgett: He has got copies of them.

349 The Witness: I have got copies of the bill. That is the book [indicating].

Mr. Pillsbury: Well, I would rather not take the time now to look up those. Mr. Blodgett, have you got a record of the Margaret Thomas, sent through by your people, Crowell & Thurlow, and having a bill from the Towing Corporation in connection with that?

Mr. Blodgett: I don't know anything about it; I never heard about it. Crowell & Thurlow were not our people.

Mr. Pillsbury: They are alleged to be the agents of the owners in that case.

Q. 74. When was that trip?

A. In August, 1916, I believe.

Q. 75. In August, 1916. Was the bill rendered by the Cape Towing Corporation, to your knowledge, as to that trip?

A. That must have been September. I couldn't trust my memory on that date.

Q. 76. Either in August or September?

A. It must have been after September 8th, because otherwise there would be no bill from the Cape Towing Corporation. If you will allow me to look at the book, I can tell you in a moment. [Looks at the book.] Oh, it was October,—October 26th the Margaret Thomas went through.

Q. 77. And to whom was the bill rendered for that?

A. Crowell & Thurlow.

Q. 78. And by whom?

A. By the Cape Towing Corporation.

Q. 79. They had a tug, did they?

A. They were furnished with a tug. That must have been a schooner.

Q. 80. And was that bill paid?

A. Yes; paid on December 20, 1916, \$42.81.

Mr. Pillsbury: Now, Mr. Blodgett, you hand me a bill of the Cape Towing Corporation, dated December 15, 1916, for this trip of the Bay Port. That bill has not been paid, has it?

Mr. Blodgett: Not to the Cape Towing Corporation.

[The bill is marked as "Canal Company Exhibit 14."]

Mr. Pillsbury: Now Mr. Blodgett hands me a bill dated May 3, 1917, for the tows for this trip, of \$119.65, which I will have marked, that bill having been paid.

350 [The bill is marked as "Canal Company Exhibit 15."]

Cross-examination.

(By Mr. Park:)

X Q. 81. Did you prepare the articles of association for the Cape Pilots' Association?

A. I dictated them.

X Q. 82. Did you have a form from which you dictated them?

A. No, sir.

X Q. 83. Are you a lawyer?

A. No, sir.

X Q. 84. Where did you dictate them?

A. In the pilots' office, the office building there at Buzzard's Bay.

X Q. 85. Did you go from New York to Buzzard's Bay for the purpose of the organization of this pilots' association?

A. No, sir; not particularly.

X Q. 86. What did you come down there for?

A. On business of the company.—Canal Company.

X Q. 87. Well, it was accomplished on that trip, was it not?

A. Well, the business for the Canal Company that I went for was accomplished.

X Q. 88. Did you dictate, at the meeting of the pilots that night, those articles of association?

A. I dictated them at the request of the pilots; yes.

X Q. 89. Did you do it right there?

A. Right in the room; yes.

X Q. 90. And you had no form to go by?

A. No, sir.

X Q. 91. Did you own either of the tugs, the John C. Stuart, the Hazelton or the Dalzelline,—did the Canal Company own either of them?

A. Not at that time; no, sir.

X Q. 92. You assigned all of your rights and interests in those three tugs to the Cape Towing Corporation?

A. Yes, sir.

X Q. 93. Your interests were just simply to charter and nothing more?

A. Well, in the case of the Stuart we had a purchase agreement.

X Q. 94. That is, you had an option to purchase?

A. Yes, sir.

X Q. 95. She was owned by the Erie Railroad Company, was she not?

A. Yes, sir.

X Q. 96. Was that option to purchase ever exercised by the Cape Towing Corporation?

A. No, sir.

351 X Q. 97. Was it ever exercised by the Canal Company?

A. Yes, sir.

X Q. 98. So you did not assign to the Towing Corporation the right of purchase?

A. No, sir.

X Q. 99. She was afterwards taken over by the Canal Company and paid for by the Canal Company?

A. The purchase agreement was completed.

X Q. 100. Did you intend to assign to the Cape Towing Corporation all your rights in the John C. Stuart, or not?

A. Yes, sir.

X Q. 101. Did you mention the fact that you reserved the option of the Canal Company to purchase that boat and that your contract hire should go upon the purchase price of the boat, or not?

A. No, sir.

X Q. 102. Nothing mentioned about it at all?

A. No, sir.

Mr. Park: I think that is all.

(By Mr. Blodgett:)

X Q. 103. Mr. Coakley, you are private secretary for Mr. Belmont?

A. No, sir.

X Q. 104. You are in his office?

A. Yes, sir.

X Q. 105. How long have you been with him?

A. Over twenty-six years; not quite twenty-six years, rather.

X Q. 106. You say this Cape Towing Association was organized, —which was organized first, the Cape Towing Corporation or the Pilots' Association?

A. The final organization, I believe, of the Towing Company was completed first.

X Q. 107. Did you receive any instructions from Mr. Belmont in reference to organizing those corporations?

A. I never spoke a word to him about it.

X Q. 108. Did you receive any instructions from Commodore Miller in reference to it?

A. No, sir; not about the organization.

X Q. 109. How did you happen to go ahead to organize the Towing Company.

A. I did not organize the Towing Company.

X Q. 110. Didn't you have to do with organizing it?

A. Not particularly, except probably, as to fixing the rates, I helped some.

X Q. 111. Were you a member of the corporation?

A. Not the Towing Company; no, sir.

X Q. 112. Were you an officer of the corporation?

A. No, sir.

352 X Q. 113. As being an officer of the Canal Company, did you have to do with fixing the rates that they should charge?

A. No, sir.

X Q. 114. Do you know who the directors of the Towing Company were?

A. Yes, sir.

X Q. 115. Were they all in your office?

A. No, sir.

X Q. 116. How many of them were in your office?

A. Two.

X Q. 117. How many directors were there?

A. Three.

X Q. 118. Who was the other one?

A. The president, Mr. Frank J. Ott.

X Q. 119. And was he a resident of Delaware?

A. No, sir.

X Q. 120. What?

A. No, sir.

X Q. 121. Wasn't he a resident of the place where the corporation was organized?

A. Not at that time; no, sir; he was not an incorporator.

X Q. 122. He was not an incorporator?

A. Are you questioning me now as to the incorporators or directors, Mr. Blodgett?

X Q. 123. Directors.

A. Oh, the directors at the time of incorporation were not the same.

X Q. 124. How much stock was issued in the Cape Towing Corporation?

A. \$1,000.

X Q. 125. And do you know who the stockholders are?

A. Yes, sir.

X Q. 126. Who are they?

A. The directors, I believe, hold the entire stock,—did hold it at that time anyhow.

X Q. 127. And two of those directors are in your office?

A. Yes, sir; were then.

X Q. 128. Is it not true that that stock, or a large part of it, was owned by the Canal Company?

A. No, sir; none of it.

X Q. 129. They have never had any interest in the stock?

A. No, sir.

X Q. 130. Who were the two directors that held this stock that were in your office?

A. Edward Rice and Charles Maass.

X Q. 131. Who is Edward Rice?

A. He is vice-president of the company.

X Q. 132. Of what company?

A. Of the Cape Towing Company.

353 X Q. 133. Of the Cape Towing Company. What is his position in your office?

A. He is a clerk there.

X Q. 134. How much wages does he get?

A. I can't remember just now.

X Q. 135. About how much?

A. Probably \$100 or \$125 a month. I don't know.

X Q. 136. A month. And how much of that stock does he own?

A. I believe three shares, or one share; three shares I think.

X Q. 137. Who is Mr. Maass?

A. He is an employee of the Cape Cod Canal Company, or an officer.

X Q. 138. And what wages does he get?

A. Well, he gets a little bit more,—some more than the other.

X Q. 139. How much stock does he own?

Mr. Pillsbury: Let us find out what he did get.

The Witness: I don't want to get the man in trouble; say \$250 a month.

X Q. 140. And how much stock did he own?

A. I believe he owned the majority, 44 or 43 shares; something of that sort.

X Q. 141. So those two men owned practically the whole of the company?

A. Yes, sir.

X Q. 142. The other man—the president owned how many shares,—one?

A. Three, I believe.

X Q. 143. What?

A. Three, I believe.

X Q. 144. Three. Now, Mr. Maass is secretary of the Canal Company, is he not?

A. He is.

X Q. 145. And was at that time?

A. Yes, sir.

X Q. 146. Did the Canal Company guarantee the Towing Company a sufficient sum to pay the expenses of the operation of the boats?

A. No, sir.

X Q. 147. How much did they guarantee them?

A. Didn't guarantee them anything.

X Q. 148. Sure about that?

A. Vice-President Miller had made some verbal promise of guaranty, but the Canal Company as a company never did.

X Q. 149. The Canal Company never did?

A. The Pilots' Association are you talking about now?

354 X Q. 150. No; the Towing Company.

A. Oh, yes; I beg pardon,—the Towing Company,—yes.

X Q. 151. How much did the Canal Company guarantee them?

A. They guaranteed the earnings of at least \$3,000 a month for each tug.

X Q. 152. And that was enough to pay all the expenses of the tugs, was it not?

A. No, sir.

X Q. 153. How much were the expenses of the tugs?

A. They ran sometimes \$4,000 a month.

X Q. 154. What?

A. Sometimes \$4,000 a month.

X Q. 155. And how often to \$2,000 a month?

A. Not that I know of at any time, because, since the date of that agreement, the prices of everything have gone up so tremendously it is impossible for them to meet that figure.

X Q. 156. At the time of the organization the \$3,000 was sufficient to cover it, was it not?

A. I thought so.

X Q. 157. And it was intended to be sufficient to cover it, was it not?

A. Not particularly.

X Q. 158. In reference to the so-called Pilots' Association, did you

receive any instructions from anyone to assist in organizing that association,—from your company?

A. No, sir; on the contrary.

X Q. 159. Why were notices sent out on September 1st by your company in reference to this Pilots' Association, stating that such an association had been formed on September 1st, when it was not attempted to be organized until September 28th?

A. September 28th?

X Q. 160. Yes.

A. I don't know where that date comes in.

X Q. 161. What?

A. I don't know where that date comes in.

X Q. 162. Didn't you say your meeting down there with them was September 28th?

A. Yes.

X Q. 163. That was the first beginning of attempting to organize the association?

A. Correct.

X Q. 164. And why did your company send out notices on September 1st that the association had been organized and that
355 they were no longer responsible?

A. I don't know that they had been organized.

X Q. 165. Do you know why that notice was sent out?

A. No, sir.

X Q. 166. You knew it was sent out?

A. I was aware of it, I suppose.

X Q. 167. On September 1st?

A. It is dated that day.

X Q. 168. Yes. And it was sent out to the public, was it not?

A. I believe so; yes.

X Q. 169. And in that notice your company stated: "This Company therefore respectfully gives notice that it will grant no further pilots' permits and that persons holding our present permits must apply to the proper Government authorities if they wish to navigate a vessel through the Canal." That is true, is it not?

A. Yes, sir.

X Q. 170. Did you ever withdraw any pilots' licenses that the Canal Company had issued to any pilots, from them?

A. I never did.

X Q. 171. Did your company, to your knowledge?

A. Not to my knowledge,—I don't think so.

X Q. 172. And all those who have ever had licenses have still got them so far as you know,—from the Cape Cod Canal Company?

A. They are of no value, though.

X Q. 173. I say, they have still got them, as far as you know?

A. They may keep them as souvenirs; that is all they are good for.

X Q. 174. Now, in this so-called Pilots' Association, you did not fix on the salary of the pilots that day when you were down there?

A. No.

X Q. 175. Was there any talk about it?

A. Yes, there was considerable talk amongst themselves as to what

it would be, and we hadn't time enough to settle the question. I couldn't decide it for them.

X Q. 176. When was that settled, do you know?

A. No, I do not.

X Q. 177. Did you have anything to do with it?

A. No.

X Q. 178. I see that Article 4 of these articles you drew says:

356 "It is understood, each for the other, that the monthly salary of each pilot is to be the rate of [blank] dollars to be paid from the earnings each month; and if such earnings are not sufficient to meet expenses and salaries, the difference will be made good by the Cape Cod Canal Company."

A. Yes, sir.

X Q. 179. You agreed for the Canal Company that they would do that?

A. I did not agree. They understood from their promise from Commodore Miller that would be the case, and I said: "You can put that in, that is permissible."

X Q. 180. That is, you knew that the Canal Company had agreed?

A. I certainly did,—I knew that Commodore Miller had committed the Canal Company to that stand,—I had to know it.

X Q. 181. And after you went back to New York, did you take this up with a lawyer?

A. No, sir.

X Q. 182. Why not?

A. Well, for one reason, I felt that I had exceeded my duties in even assisting them, and therefore I did not do anything further when I got back to New York. In the second place the counsel whom I could have taken it up with was very much engaged.—I think that at that time the senior was on the Mexican border. I had intended to take it up, as I had promised the pilots, with some counsel in New York; but, in considering the matter, I felt that it would not be justifiable on my part to put them to that expense, and I did not do anything further in the matter.

X Q. 183. You took these articles of association, which you had dictated, with you to New York?

A. No, sir.

X Q. 184. The minutes of the meeting which have been offered show that they were submitted to you to take to New York to have them drawn up in legal form.

A. Yes. They were not written out there; they came to me by mail.

X Q. 185. In view of that statement in the minutes, did you not understand that the matter had not been legally organized when you left?

A. As far as legality went, yes.

Mr. Pillsbury: I should suppose that a voluntary association that was organized by men in this way—

The Court: I shall apply my own views of the law, and not Mr. Coakley's.

357 X Q. 186. Did anyone but Mr. Rochester ever sign?

A. Not that I know of, unless they signed afterwards, after I left the meeting.

X Q. 187. They did not sign when you were there?

A. They were not written.

Mr. Pillsbury: Sign what? You showed him the minutes when you asked the question.

Mr. Blodgett: I showed him the minutes.

Mr. Pillsbury: I think the impression that was conveyed was that you showed him the articles.

X Q. 188 [showing the witness the minutes]: Did Captain Rochester sign them in your presence?

A. No, sir.

X Q. 189. When did you first see Captain Rochester's signature on it?

A. When it arrived in New York the next day, I should say on the 30th of September, 1916. It was written from the Cape on the 29th.

X Q. 190. Have you got the letter which accompanied it?

A. Yes, sir.

X Q. 191. Will you produce it?

A. Yes, sir [producing the letter.]

Mr. Blodgett: I will offer that letter and have it marked.

[The letter is marked as "Bay Port Exhibit 10."]

X Q. 192. And, as I understand you, after your receipt of that letter and the enclosures mentioned, you know nothing about the Cape Towing Association afterwards with reference to the organization of it?

A. Nothing,—practically nothing. Excepting in one instance, I scarcely heard of it.

X Q. 193. Did you know about the circulars that were sent out by your company stating that the canal was safe for the passage of vessels?

A. Yes, sir.

X Q. 194. And did you know about circulars that were sent out saying that there was a depth of 25 feet of water at mean low water?

A. Where is that circular?

X Q. 195. Do you know of your book of regulations that was sent out saying there were 25 feet of water?

A. That is the charter requirement; yes.

358 Mr. Pillsbury: Do you claim your client received either the circular or the regulations?

Mr. Blodgett: I understand he saw the regulations.

Mr. Pillsbury: Did your client receive the circular? If your client did not receive it, I do not see any materiality.

X Q. 196. Is that the circular or book of regulations which your company published at that time and sent out [passing the witness a document]?

Mr. Pillsbury: What time?

Mr. Blodgett: Just prior to the time of this accident.

A. Yes, I would recognize it as such.

Mr. Pillsbury: Will you look at it rather carefully,—because we have been through it before, and Mr. Blodgett has a favorite copy of those regulations, and sometimes I don't think it is quite up to date.

Mr. Blodgett: I don't think that is quite a fair statement.

[Recess of ten minutes. Resumed.]

X Q. 197. Mr. Coakley, I show you again the copy of the regulations which I handed you before the intermission. Is that a copy of your regulations which was in force at the time and prior to the time of this accident?

A. I should judge it to be so; yes.

X Q. 198. And does not that, on the first page, the third line, say "depth at mean low water, twenty-five feet"?

A. Yes,— "General Information."

X Q. 199. And is there anything in there or anywhere else that contradicts that?

A. I believe there is a circular limiting the draft of any vessel to go through the canal at 20 feet.

X Q. 200. And vessels drawing up to 20 feet were permitted to go through the canal up to that time?

A. Yes, sir; I believe so.

X Q. 201. And the canal was held out to be safe for them to go through?

Mr. Pillsbury: I object to that question.

Mr. Blodgett: Well, I will withdraw it,—I don't care.

Mr. Pillsbury: And I object to this being admitted unless it is intended to be shown that that was furnished to your company and was read by them and relied on by them in making this passage.

359 The Court: I am against you on that. You state it too broadly. A tradesman may offer his goods or a canal company may hold itself out as running a canal for certain classes of public trade. If that is a general holding out or a general invitation and it gets to the knowledge of a certain ship owner as one of the public, and he acts on that general holding out and information furnished in connection therewith—

Mr. Pillsbury: To that extent, that the canal was open for traffic, I have no objection. But the allegation of the libel is, that the representation was that it was 25 feet and that we misled them in some way.

Mr. Blodgett: At mean low water.

The Court: If you were holding out to the public generally that

you had a 25-foot canal, and the owners of the steamer, as members of the public, received that information and acted on it, I think that fact may be shown.

Mr. Pillsbury: I think very likely that is so. But my suggestion is, that it should be stated that that is to be proved by Mr. Blodgett before we put this in evidence at all.

The Court: This may be part of the proof.

Mr. Pillsbury: Then if it is not followed up, I shall renew my objection.

Mr. Blodgett: My captain is going on the stand, and he received this copy and saw the depth of water that was stated there.

[The copy of the book of regulations is marked as "Bay Port Exhibit No. 11."]

X Q. 202. Did you know that these so-called lake steamers or whalebacks were solicited to go through the canal?

A. No, sir.

X Q. 203. You did not know about that personally?

A. No, sir.

X Q. 204. Did you know that shortly after this accident the company issued a notice stating that they would no longer be allowed to use the canal?

A. Yes, sir.

X Q. 205. And was this the circular that was sent out by your company to that effect in February [passing the witness a circular]?

A. Yes, sir.

Mr. Blodgett: I will offer that.

360 [The circular is marked as "Bay Port Exhibit 12."]

X Q. 206. Do you remember when the Chisholm was sunk in the canal?

A. I believe it was in July, 1916.

X Q. 207. August, 1916, was it not?

A. I can find the exact date in the other book; some time about then.

X Q. 208. About then. Right after that accident your company immediately took steps to have the Towing Corporation and the Pilots' Association organized, did they not?

A. Shortly after; yes, sir.

Mr. Blodgett: That is all.

Redirect examination.

(By Mr. Pillsbury:)

Q. 209. The Bay Port remained in the canal for some time, did she not, after she sank?

A. Yes, sir; about two months.

Q. 210. And during that time was navigation of the canal prevented by its presence?

A. Almost completely.

Q. 211. How was it finally cleared from the canal?

A. Blown up, removed in pieces.

Q. 212. Blown up by the Canal Company?

A. Through the Foundation Company; yes, sir.

Mr. Pillsbury: That is all. Now I will put in that correspondence we were speaking of.

Mr. Blodgett: You had better put them in later; we will check it up and put it in later.

Mr. Pillsbury: There was some correspondence between the office of Storey, Thorndike, Palmer & Dodge and Mr. Blodgett's office in relation to the Bay Port after the accident which Mr. Blodgett and I are going to put in. I will put it in, but the letters are not as yet arranged, and I will do it as soon as they are.

Recross-examination.

(By Mr. Blodgett:)

X Q. 213. Did you say that Mr. Maass was present at this meeting?

A. He came in during the meeting, I believe.

X Q. 214. And he was there during the meeting?

A. As a sort of curiosity witness.

361 Mr. Blodgett: "Curiosity witness." That is all.

Mr. Pillsbury: That is our case if your Honor please,—oh, I beg your pardon; I haven't put in the interrogatories and answers. I have had the interrogatories and answers which I am to use written out on separate pieces of paper for the interrogatories to the White Oak Company and the interrogatories to the Scott Company, with the answers to the questions, for your Honor's convenience.

The Court: Yes, thank you. I will take those and run them through as the trial goes on. I think I can do that.

Mr. Pillsbury: These are the White Oak ones, and these are the Scott ones.

Mr. Blodgett: Do you offer all of those?

Mr. Pillsbury: I offer only certain of these interrogatories and answers.

Mr. Blodgett: We would like to know just what is offered, because we may have to call your Honor's attention to others.

The Court: Yes, you can do that in connection with your case. Of course, that is the rule, that if a party offers part of the interrogatories, the other party may offer any of the others.

Mr. Blodgett: In order that we may be sure, are you going to call the superintendent of the canal? He is here in the room.

Mr. Pillsbury: I have finished my case.

Mr. Park: I don't suppose your Honor wants any opening?

The Court: I think I can see around it, so I can follow the evidence.

362 *Evidence for The T. A. Scott Company, Inc.*

THOMAS A. SCOTT (sworn).

(By Mr. Park:)

Q. 1. Your full name?

A. Thomas A. Scott.

Q. 2. And were you the president of the T. A. Scott Company, Incorporated, in 1916?

A. I was.

Q. 3. That corporation is organized under the laws of what State?

A. Connecticut.

Q. 4. Branch office in Boston?

A. Yes, sir.

Q. 5. Who had charge of your branch office in Boston?

A. Captain Lewis was in charge of the wrecking, and Mr. Smith was in charge of the lighterage.

Q. 6. Did you have a plant in Boston?

A. Small one; yes, sir.

Q. 7. And have you a plant at New London, Connecticut?

A. Yes.

Q. 8. That is the home quarters of the company?

A. Yes, sir.

Q. 9. How long have you been engaged in salvage operations?

A. About twenty years.

Q. 10. And in what waters?

A. On the New England coast and—on the Atlantic coast, in fact.

Q. 11. And does this include all classes of vessels?

A. Yes, sir.

Q. 12. And from warships down to a canal boat?

A. Yes, sir.

Q. 13. And at the present time what is your position, Mr. Scott?

A. I am attached to the bureau of construction and repair, in charge of salvage operations for the United States Government.

Q. 14. Both in this country and abroad?

A. Yes, sir.

Q. 15. Anywhere?

A. Yes, sir.

Q. 16. In other words, you are in charge of all of the salvage operations in the United States at the present time?

A. Yes.

Q. 17. How long have you held that position?

A. Since the thirty-first day of January.

Q. 18. And up to that time you were president of T. A. Scott Company?

A. Yes, sir.

Q. 19. And your father was Thomas A. Scott?

A. Yes, sir.

Q. 20. Was he engaged in similar work,—salvage operations,—all his life?

A. Beginning at 73.

363 Q. 21. Do you maintain a small plant or a large plant in New London?

A. A large plant, I should say, sir.

Q. 22. What other corporations are there on the coast that are engaged in salvage operations besides the T. A. Scott Company, or what others were there in December, 1916?

A. The Merritt & Chapman plant in New York is the only plant that I know of that maintains an equipment in readiness at all times.

Q. 23. There are other small ones who maintain a small plant for small work?

A. Yes, sir.

Q. 24. How long had you known Captain Joseph Lewis of Boston?

A. I should say about fifteen years.

Q. 25. And what had been his business?

A. Wreck master.

Q. 26. For what company before he was in your employ, if you know?

A. For the Boston Towboat Company.

Q. 27. In the salvage operations of the Boston Towboat Company?

A. Yes, sir.

Q. 28. And with his headquarters in Boston?

A. Yes, sir.

Q. 29. What do you know about his ability and skill in connection with all sorts of marine operations and salving wrecked vessels?

Mr. Pillsbury: I think that opens rather a wide line of inquiry as to his general qualifications.

The Court: I think that is a fair matter to be shown.

Q. 30. What can you say as to his ability and as to his skill?

A. I consider he was an extremely able man in that line of work.

Q. 31. Is there such an office in your corporation, the T. A. Scott Company, as superintendent?

A. No, sir.

Q. 32. Was there in December, 1916?

A. No, sir.

Q. 33. What relation did he bear to the T. A. Scott Company in December, 1916? Did he hold any office?

A. No, sir.

Q. 34. What would you call him?

A. A wreck master.

Q. 35. A wreck master. That means he is in charge of wrecks where his services are engaged?

A. Yes.

Q. 36. And takes full charge?

A. Yes.

Q. 37. Do you know whether he went down to the wreck of the Bay Port in December, 1916?

A. He did.

364 Q. 38. Do you personally know the canal?

A. I am more or less familiar with it; yes, sir.

Q. 39. Have you wrecked vessels in the canal?

A. Yes, sir.

Mr. Blodgett. You mean salved vessels in the canal, do you not?

The Witness: Both.

Mr. Park: What we call "wrecking" a vessel is saving it. That is the language of the wrecker, as I understand.

Q. 40. Is that a common use of that term, meaning to save a vessel?

A. Yes, sir.

Q. 41. You were there on the Watuppa. Did you raise her?

A. I was there several times during the operation.

Q. 42. Your company raised her?

A. Yes, sir.

Q. 43. You also removed the Chisholm from the canal?

A. Yes, sir.

Q. 44. And have you had a contract with the canal for the removing of boulders and furnishing divers' services there for two or three years?

A. Yes, sir.

Q. 45. How long have your employees been at work on the canal in removing boulders?

A. Ever since there was any traffic through there—well, no—In removing boulders?

Q. 46. Yes.

A. Well, I should say about a year and a half.

Q. 47. Did you have any vessels in December, in 1916, at Boston, engaged in salving operations?

A. I don't know about that particular date. We had vessels at the canal.

Q. 48. At the canal?

A. Yes.

Q. 49. Engaged in salvage operations, or engaged in work?

A. In work anyway, and I am not sure that we did have a vessel there just for salvage work.

Q. 50. Do you own the boat Salvor?

A. Yes.

Q. 51. She is a wrecking vessel?

A. Yes.

Q. 52. A small one?

A. Yes.

Q. 53. Has she power of her own, or not?

A. No power except hoisting power.

Q. 54. That is all?

A. Yes.

Q. 55. Do you know where she was on December 13, 1916?

A. I think she was at the Sandwich end of the canal.

365 Q. 56. You think she was there?

A. Yes.

Q. 57. You do not know whether she was towed from Boston or not?

A. I do not recall that.

Q. 58. Do you know anything about a request made by the agents or owners of the steamer Bay Port for Captain Lewis to proceed to the capal?

A. I simply know that he was asked to go down there.

Q. 59. How do you know that,—by hearsay?

A. By hearsay; yes. His reports show that.

Q. 60. You know that he went there?

A. Yes, sir.

Q. 61. Now, captain, is it customary and usual, or is it unusual, for you to go to the assistance of vessels in distress upon the request of those interested in the vessels?

A. It is.

Q. 62. Well, is it usual, or unusual?

A. It is customary.

Q. 63. Customary. And out of the number of vessels which you have salved and worked upon on the coast since you have been engaged in the business, what is the proportion of those whereby you go to the assistance of the vessel in distress upon simply the request of those interested, and of those where you make a formal contract?

The Court: It is possible both methods are common, is it not?

Mr. Park: No; in ninety cases out of one hundred they go at once, without a formal contract.

The Court: You may show what the general business background is,—to that extent.

Mr. Park: That is all I want to do.

Q. 64. Generally, in your work of salving vessels on the coast, do you go at the request of the owners without making a formal contract or not?

A. We generally go that way; yes, without any formal contract.

Q. 65. And what proportion would that bear probably to all the boats on which you work?

A. I should say from 75 to 90 per cent of the cases are on that basis.

The Court: And your compensation is on a salvage basis?

The Witness: Yes, sir.

Q. 66. In those cases where you go by the request of those having an interest in the boat, is it usual and customary, as far as 366 you know, with the professional salvors on this coast, to make any charge where they are not successful, or do they only make a charge where their efforts are successful?

A. We consider we are only entitled to compensation when we are successful.

Q. 67. And is that what is called "no cure no pay basis"?

A. As I understand it; yes, sir.

Q. 68. Did you go down to the Bay Port while she was in the canal?

A. Yes, sir.

Q. 69. When did you go there?

A. I don't remember the exact date, but soon after she sank, I think.

Q. 70. When she was stranded the first time, or the second time?

A. The second time.

Q. 71. The second time. And was Captain Lewis with you?

A. I think he was there at the time.

Q. 72. Do you know where she was stranded the first time?

A. Approximately.

Q. 73. What is there on the south side,—I call the south side the right-hand side going to the eastward,—what is there there upon which you could fix any object that would remain stable in the ground upon which you could exercise force?

A. There was nothing.

Q. 74. Evidence has been given, Mr. Scott, by Captain Kidston,—I think it was,—that an anchor would have held the Bay Port in position where she was stranded the first time. What have you got to say about that, if you know the locality?

Mr. Pillsbury: Just a moment. I don't understand that he saw the ship the first time.

Mr. Park: He knows where she was aground the first time.

Mr. Pillsbury: That is station 230. Do you say he has examined the place there?

Mr. Park: Yes.

Q. 75. You went to station 230 where she was aground the first time?

A. Yes.

Q. 76. Did Captain Joseph Lewis point out, or not, where she was aground?

A. Somebody did; I remember going there.

Q. 77. Was he there with you?

A. I think so.

367 Q. 78. What is there on that ground to which you could make anything fast?

A. There is nothing that you could make fast to and produce any pull on it.

Q. 79. Now, captain, the Bay Port, drawing 18 feet, 3 inches,—about that,—struck the south side of the canal about two o'clock in the afternoon of December 13, 1916, having 2,500 or 2,600 tons of coal,—about that,—2,400 tons of coal. She was what is known as a pig or whaleback, about 265 feet in length. She laid practically parallel with the south side of that canal. There was from 25 to 30 feet of water in the canal abreast of her. She was leaking, to what extent at that time they did not know, but the water was gaining on the pumps. Two or three of the tugboats of the Canal Company, or employed in the canal exclusively, had attempted to pull her off at practically high tide and were unable to do so. Will you tell us,

upon the statement of facts which I have given you, what it was proper to do in order to relieve that vessel from her stranded position?

A. Stop the leak and pump her out.

Q. 80. Well, suppose after you had stopped the leak and pumped her out she did not float, then what would you have to do?

A. Lighter the cargo.

Q. 81. And if that did not float her, what would you have to do?

A. It would depend upon conditions; in that instance I should think that the removal of the cargo would certainly float that vessel.

Q. 82. You think she would float after the cargo was out?

A. If she grounded there even at high water,—at low water or high water, either one,—she would certainly float if they removed the cargo and the water.

Q. 83. Well, if the attempt to float her upon the afternoon of December 13th with the assistance of the three tugs were unsuccessful, would you think she would float unless the leak had been stopped and a part of the cargo removed?

A. No, sir.

Q. 84. Now, you are charged with fault because you did not in some way make that vessel fast to the south bank. If you had attempted to make that vessel fast to the south bank, how could it have been accomplished?

368 A. By placing perhaps six anchors, two abreast on the port side, two abreast on the starboard side, and one ahead and one astern in the canal.

Q. 85. What size anchors for a vessel of that size would be required?

A. In that canal they should be from four to ten thousand pounds apiece.

Q. 86. Were there any such anchors at the canal at that time?

A. No, sir; there were not enough there. There were perhaps one or two there of that size.

Q. 87. Where would you have to get those anchors from?

A. New London or Boston.

Q. 88. And that would consume how much time?

A. Several days.

Q. 29. And in the meantime, if you were unable to find the leak and to stop that leak, what might happen to that vessel?

A. Very likely to roll over into the canal.

Q. 90. Captain, what was the great danger and liability existing before she came off that south bank to that vessel?

A. That the current would cut the sand out from under the low side or the off-shore side of the ship; and that if she sunk, there would be a hole under the low side which would tend to roll the ship over if she sank or slid down the bank.

Q. 91. That is what you were afraid of?

A. Yes, sir.

Q. 92. From your experience with the Watuppa—was the Watuppa upon the side of the canal?

A. Yes, sir.

Q. 93. Did she roll over, or not?

A. She did.

Q. 94. And she had to be raised, I understand, by bulkheading that portion of the canal?

A. Yes, sir.

Q. 95. Would you have had to run lines to the north side of the canal as well as to the south to have kept her there in that position?

A. Yes, to have kept her free of the boulders on the bank.

Q. 96. Would it have availed to have established and constructed dead men and used them?

A. You could do it on the land, but you couldn't do it in the canal.

Q. 97. I mean, could you have put dead men there?

A. Yes, it could be done.

Q. 98. And what is a dead man, and how are they constructed?

369 A. Why, it is usually a heavy piece of timber buried in the ground, and you excavate a trench to the centre of the dead men and run a line to them and make it fast. Sometimes vertical sticks are put in front of the dead men to offer greater resistance.

Q. 99. Were there any means at that time at the canal for constructing dead men?

A. No, sir; everything was not there. There were some things available.

Q. 100. How long would it have taken to construct dead men on that bank?

A. Several days.

Q. 101. If, on the 14th of December, a diver had found a leak upon her starboard side and had stopped that leak, and the ship's pumps were gaining on the leak then,—gaining on the water, from the viewpoint of a salvor what should be done?

A. Float the ship as soon as possible.

Q. 102. And why?

A. Get her out of—get her away from contact with the rocks and the danger of further punctures.

Q. 103. And if she came off, then what would you do with her?

A. Get her out of the canal as soon as possible.

Q. 104. Get her out of the canal. Do you know anything about the various depths of water in the canal?

A. In a general way I do. I am not familiar with it in detail.

Q. 105. You are not familiar with it as an engineer?

A. No, sir.

Q. 106. You have never navigated through there?

A. No, sir.

Q. 107. Do you hold a license as a pilot yourself?

A. No, sir.

Q. 108. I mean, on the coast?

A. No, sir.

Q. 109. You have in your lifetime?

A. A small one.

Q. 110. Captain, there is a charge in the libel against you that, at the time that the Bay Port came off the south bank, the tide run-

ning east and the Bay Port heading east, the tugs should have been heading the other way,—that in fact they were heading the wrong way. What can you say as to that charge?

A. I don't think that the tugs would have been in any better position headed the other way; in fact, I don't think they would have been in as good position.

Q. 111. Give us your reason, please.

A. For the reason that, if headed the other way, they would not have had steerageway until they had gotten away from the vessel.

Headed as they were, they had steerageway all the time, and
370 it was very easy to turn off into the canal by simply letting go the head lines.

Q. 112. If they had wanted to hold the Bay Port in the canal, in the deep water right where she came off the bank, the Bay Port having steam on her boilers and control of her engines; the three tugs,—two of them made fast alongside of her and heading to the tide,—what difficulty would there have been in keeping her right there in the deep water?

A. I should not think there would be any difficulty.

Q. 113. Can you see any reason why they could not have done it if anybody had wanted to do it, who had charge?

A. No, sir.

Q. 114. Did they have better control of these tugs, or not, heading against the tide, if they had wanted to keep the Bay Port right there in the deep water?

A. They had better control of the boats.

Q. 115. You did not go down to see her until after she was stranded the second time. I understand?

A. That is right.

Q. 116. Do you know anything about the construction of dead men at the time the Chisholm sank?

A. Yes; I know there were some dead men put in there.

Q. 117. Do you know how long a time was consumed in the construction of those dead men?

A. I should say four or five days.

Q. 118. Well, now, captain, what object, if any, was there, after the leak had been discovered and plugged, and the steamer's pumps were gaining on the water, for the tugboats to exercise any force against the Bay Port in trying to keep her on that bank?

A. None whatever, sir.

Q. 119. Would that have been a good move, or not?

A. Well, not unless you wanted to puncture your bottom again.

Q. 120. Would that likely have resulted, or not?

A. It very likely would have.

Q. 121. Is Captain Lewis dead?

A. Captain Lewis is dead.

Mr. Park: Right here, your Honor.—I suppose this question might come up,—the statute of Massachusetts, to which my attention has been called—and I have it here—

Mr. Pillsbury: There is no question you have a right to
371 put in a statement by him if you have one made previous to
the bringing of suit—

Mr. Park: Yes. I have two statements,—one was made to my
office.

Mr. Pillsbury: —if you have one made of his own knowledge
and before the bringing of the action.

Mr. Park: One was made,—the report of Mr. Lewis to the T. A.
Scott Company,—before any action was brought. Another one was
made at my office on the 17th of January, after the action of the
Cape Cod Canal Company against the T. A. Scott Company was
brought, but antedating the suit in which we have been brought in
by petition. So in one suit it would not be competent, and in the
other it would be.

Mr. Pillsbury: As to the first, before our suit was brought, I have
no objection. As to the other, apparently we have nothing to do,
so Mr. Blodgett would have to deal with that.

Mr. Park: You brought us in.

Mr. Pillsbury: I brought the intervening petition, but I under-
stand that makes you practically a co-defendant.

The Court: The first statement appears not to be objected to.

Mr. Park: Your witness.

Mr. Pillsbury: Are you going to put in the statement? Do you
mind putting it in now or letting me see it?

Mr. Park: Mr. Birdsall, representing the Boston office, has gone
to his office for it.

Q. 122. I forgot to ask you if Joseph Lewis had had extensive
experience in salvage work on this canal while in your employ?

A. Yes, sir, he had.

Mr. Park: I do not know how far the interpretation of this statute
has gone. I understand there is a case which was tried here before
Judge Dodge in this district, and Judge Dodge held that declarations
made by a deceased person before any suit was brought were com-
petent testimony.

The Court: I understand that is not objected to, so there is no
occasion for me to rule on it.

372 Mr. Park: The rule is entirely new to me. We have no
such statute.

The Court: If it is not objected to, there is no occasion for me to
rule.

Q. 123. Then one further question, Mr. Scott: Did you have any
conversation with Mr. Lewis when you went to the canal, while the
Bay Port lay sunk the second time, in regard to his operations and
relations to that Bay Port?

A. Oh, I presume I did.

Q. 124. Do you specifically now remember anything that he said?

A. No, sir, I do not.

Cross-examination.

(By Mr. Blodgett:)

X Q. 125. As I understand you, you understood that you were doing a salvage job down there?

A. Yes, sir.

X Q. 126. And that it was on a "no cure no pay basis"?

A. Yes, sir.

X Q. 127. And you said that the tugboats could, after she came off, have held her on the bank?

A. No, sir, I did not.

X Q. 128. Could have held her after she came off?

A. Could have held her in the stream.

X Q. 129. In the stream?

A. Yes, sir.

X Q. 130. Of course, whether they should hold her in the stream or take her off through the canal is a question for the judgment of those in charge at the time?

A. Of the pilots; yes, sir.

(By Mr. Pillsbury:)

X Q. 131. Commander Scott, did you make any charge in this case for the work at the canal?

A. On the Bay Port?

X Q. 132. Yes.

A. No, sir.

X Q. 133. Why didn't you make a charge?

A. Because I did not consider we were entitled to any compensation.

X Q. 134. Because you were not successful?

A. Yes, sir.

X Q. 135. Well, you floated the vessel, did you not?

A. Yes, sir.

X Q. 136. Well, was it because you did not float her safely that you did not make a charge?

A. Because there is no one to whom we can render any bill.

X Q. 137. You could render the bill to the White Oak
373 Transportation Company who employed you?

A. No, sir; because the hull has since been lost; and we had no guaranty before the vessel left our charge that we would be paid. Therefore there is nothing to collect from but the vessel.

X Q. 138. When do you ordinarily render your bill; how soon after you do the work?

A. That depends altogether upon how long we are getting our data together and how long the other side is getting them together.

X Q. 139. Assume you finished your work on the 14th of December; when, in the ordinary course of business, would you have rendered your bill? The first of the next month, would you not?

A. 14th of September.

X Q. 140. No; December. Wouldn't you render it, in the ordinary course, the first of the next month?

A. No, sir; not quite that. It would probably have been the first of the second month.

X Q. 141. That would be, say, the first of February?

A. I should think so.

X Q. 142. How long did the Bay Port remain there before it was determined whether or not she could be raised?

A. I don't remember the dates.

X Q. 143. About two months, was it not?

A. I don't remember definitely about that.

X Q. 144. I do not believe I quite follow you, commander, as to why you did not render a bill. If you are employed to save a vessel, and you save her—if your work is successful, in other words, and she is sunk after that, do you mean to say you render no bill for the work?

The Court: He is hardly employed, as he puts it, you see. I suppose that really all that there is between them in the case as he puts it is to agree upon the salvage if they can; and, if not, to libel for it. Isn't that the situation?

The Witness: Yes, sir.

X Q. 145. Well, is that the point—that you had not come to any agreement as to what you should be paid, and is that the reason you did not render any bill?

A. No, sir, that is not the reason. The point, as I understand it, is this, that in ordinary practice, if we float a vessel and deliver her to somebody, or the owners, then if the vessel leaves that port—if we get some form of guaranty that we shall receive whatever sum we may be justly entitled to, then we release the vessel and she goes. In this instance there was hardly time to get a bond from the owners of the vessel guaranteeing we should be paid whatever sum we might be justly entitled to.

X Q. 146. Did you make any attempt to get any such bond?

A. No, sir; not within that time.

X Q. 147. Commander, is not the real reason why you never rendered a bill because you were not successful in the enterprise?

A. No; we were successful.

X Q. 148. Did you not tell me, in answer to my first question, that the reason you did not render a bill was because you were not successful?

A. Well, because the vessel was finally lost was the only reason why we did not render any bill, because there was nobody to render it to unless the sum was collected from the vessel—and there was no vessel.

X Q. 149. So you consider that if you get a vessel to float, even though she floats in such a way as to dash herself to pieces at once, that is a successful operation?

A. I do not think—not if she remains in our charge; I shouldn't say that would be a successful operation. In this instance the

vessel did not remain under our charge; she was turned over to the pilot of the canal.

X Q. 150. Then your theory is, that she was delivered, not to the owners, but to some one else?

A. Yes, sir.

X Q. 151. Who was that some one else?

A. Why, the pilot of the canal. The captain of the ship took the vessel—took command of her.

X Q. 152. When did the captain of the ship take command of her?

A. I don't know that, sir. We turned her over to the pilot, which was the only thing we could do.

X Q. 153. Did you understand that any pilot was then employed by the owners?

A. I don't know anything about that. The pilot——

X Q. 154. Assume for the moment that no pilot was at that
375 time employed by the owners, to whom did you turn her over?

A. But there was a pilot there—a pilot whom we recognized as the pilot—canal pilot—to whom others have been turned over.

X Q. 155. Assuming for the moment that there was no pilot who had been engaged by the owners or anyone else to take care of that ship. You say you did turn her over to either the captain or the pilot. Now, if there were no pilot engaged, you must have turned her over to the captain, did you not?

A. My understanding is not like that.

X Q. 156. I am asking you for the moment to assume that fact, because we have all got to take the evidence as it stands, and I am assuming the evidence as I understand it to be.

A. What Captain Lewis should have done had there been no pilot there, I cannot answer, sir.

X Q. 157. You mean Captain Joseph Lewis?

A. Yes, sir. If I had been there I should probably have retained control of the ship myself, there being nobody else to do it.

X Q. 158. That is, that is really the duty of the one who is conducting the operation, to retain control of the ship until she is safely floated, is it not, and perhaps even beyond that, up to the time of delivery to the owners?

A. Not if the vessel is under steam and in commission; no sir. The moment the vessel floats she automatically goes under the command of the man who is in charge of the vessel, not the salvor. That is the practice.

X Q. 159. Without any regard to her condition?

A. Why, I have already said if the vessel was under steam and had her own power.

X Q. 160. Assume she was full of water, what would you say to that?

A. I should say it would be up to the salvors to keep the pump going, if it was their pump.

X Q. 161. I don't know what you mean by "their pump." You mean a pump they had brought there?

A. Yes, sir; an installation of theirs.

X Q. 162. You had not installed any pump on this ship, had you?

A. No, sir.

376 X Q. 163. The ship's pump, however, had been operating?

A. The ship's pump had been pumping.

X Q. 164. Under the direction of Joseph Lewis?

A. No, sir; the ship was pumped with the ship's pump, and that was working before he got there at all.

X Q. 165. Under whose direction was the pump working?

A. I don't know anything about that, sir.

X Q. 166. Well, really, commander, you do not know much about any of these things that you have been testifying to, from your own knowledge, do you?

A. I think so.

X Q. 167. When were you there?

A. I was there, I think, the day after she sank the second time.

X Q. 168. The day after she sank the second time?

A. Yes, sir.

X Q. 169. You were not there while she was on the bank the first time?

A. No, sir.

X Q. 170. And you were not there the day that she struck the second time?

A. No, sir.

X Q. 171. You were there after it was all over?

A. After she sank the second time; yes, sir.

X Q. 172. You have testified this morning in the Chisholm case, have you not?

A. Yes, sir.

X Q. 173. And you testified that in connection with any wrecking operations in relation to the Chisholm it would be necessary to fasten her to the bank, did you not?

A. Yes, sir.

X Q. 174. How did the bank where the Chisholm grounded compare with the bank where the Bay Port grounded?

A. The Chisholm was on the bottom and not on the bank.

X Q. 175. I understand that. But how did the bank at the point where the Chisholm sank compare with the bank at the point where the Bay Port struck, in character?

A. You mean above the water?

X Q. 176. Yes.

A. I should say it was a little higher, but not very much different in character.

X Q. 177. Was there anything more on that bank to tie her to than there was on the bank where the Bay Port hit?

A. No, sir.

377 X Q. 178. Well, then, how would you attach your ropes to the bank in the Chisholm case?

A. By sinking dead men and running wires to them.

X Q. 179. Sinking dead men in the dirt?

A. Yes, sir.

X Q. 180. Do you know whether Captain Joseph Lewis attempted to find out whether there were any dead men available?

A. He did not have to find out; he knew that there were no dead men there.

X Q. 181. How do you know that he knew it?

A. Because he was familiar with the whole locality.

X Q. 182. Did he tell you he had made any effort to find out if there were any?

A. No, sir.

X Q. 183. As a matter of fact, he did not tell you he made any effort to find out if there were any anchors available?

A. No, sir; I think he had knowledge as to that.

X Q. 184. What did he tell you as to any efforts, if he told you of any, which he made to insure the safety of the boat in case she should float?

A. He told me nothing.

X Q. 185. So far as you knew, then, he took no precautions whatever to insure the safety of the ship in the event of her floating?

A. He took every precaution that he could be expected to take, I should say.

X Q. 186. What were they?

A. Get the water out of the boat, stop the leak and get her off the beach.

X Q. 187. Getting the water out of the boat tends to make her float, does it not?

A. Yes.

X Q. 188. I am asking as to precautions with respect to taking care of her if she did float.

A. The canal pilots were there; the canal tugboats were there to take care of her if she floated; that was their business, and we looked to them to do it.

X Q. 189. Did Joseph Lewis tell you that?

A. He didn't have to tell me; he knew it, and so did I.

X Q. 190. He never told you that, did he?

A. Yes, I think he did.

X Q. 191. In his written statement?

A. Yes, his written statement shows that the tugboats were there, and the canal pilot was there; and when she floated he turned her over to Captain Lewis; that is, pilot Lewis.

378 X Q. 192. What did he say when he turned her over to pilot Lewis?

A. I was not there and didn't hear it; I only know by hearsay.

X Q. 193. Who did tell you he said anything?

A. Some of my men have told me.

X Q. 194. Then you do not know anything about that, do you, as to his turning her over to anybody?

A. I don't know what was said, except I know from his report that he did turn her over to Captain Lewis.

X Q. 195. Then it was in his report that the statement was made that he turned her over to Captain Lewis?

A. I think that is it.

Mr. Pillsbury: Have you got that report?

Mr. Park: Yes.

Mr. Pillsbury: I would like it.

[Mr. Park passes the report to Mr. Pillsbury.]

X Q. 196. That is the report made in the regular course of business soon after the accident, I suppose, is it not?

A. Yes, sir.

Mr. Pillsbury: It is dated——

Mr. Park: There isn't any date on it.

X Q. 197. Do you know about when it was made, commander?

A. Well, it is customary to make those up just as soon as we possibly can after the job, if a man is not called away. So I imagine it came within a very few days.

Mr. Pillsbury: This is quite long, so I will not read it, but I will ask that it be marked.

[The report is marked as "Canal Company Exhibit 16."]

X Q. 198. Outside of what Joseph Lewis says in that report, you have not any information from him as to any of the events which occurred, have you?

A. No, sir.

X Q. 199. If a boat is on a bank in the way that we have heard this Bay Port described as being, and you stop a leak that exists in her and begin to pump the water out, she is likely to float when a sufficient amount of water is pumped out, is she not?

A. Provided there is a sufficient amount of water under her to float her.

X Q. 200. And this boat did float when a certain amount
379 of water had been pumped out, did she not?

A. Yes, sir, she did float.

X Q. 201. Now, you understand that she had water in her at the time she floated?

A. I presume there was some water in her.

X Q. 202. Do you know how much?

A. I do not; no, sir.

X Q. 203. Would the ability of whoever was in charge of the situation to care for her depend at all on whether she had water in her?

A. I do not quite understand what you mean.

X Q. 204. Take a whaleback like this; is she more unmanageable with water in her, in a current, than she is without it?

A. I shouldn't think she would steer quite as well with any great amount of water in her.

X Q. 205. If she were down at the head in a current she would not handle, would she?

A. Well, she would handle, but not as well perhaps.

X Q. 206. The heavier you load these whalebacks, the harder it is to handle them, is it not?

A. I don't know; I never steered one, sir.

X Q. 207. Was not the bottom where the Chisholm lay rocky?

A. No, sir; I don't think the bottom was very rocky.

X Q. 208. I mean towards the bank, between the Chisholm and the bank; it was rocky, was it not?

A. Yes, sir.

Mr. Park: Do you mean the first or the second standing?

Mr. Pillsbury: This is the Chisholm,—this is another ship.

Mr. Park: The Chisholm?

Mr. Pillsbury: Yes. That is all.

(By Mr. Blodgett:)

X Q. 209. The Chisholm was made fast to dolphins on the shore side, was she not,—there were a lot of dolphins between her and the bank?

A. Yes, sir, but there were also dead men on the bank.

X Q. 210. And dead men up on top of the bank?

A. Yes, sir.

X Q. 211. A long ways off?

A. Yes, sir.

X Q. 212. Were there any dolphins in this place where the Bay Port first went ashore?

A. No, sir.

X Q. 213. You were asked if a vessel was not easier to handle when she was by the stern than she would be by the head, and you
380 said she would be,—she would steer a little harder by the head?

A. Yes, sir.

X Q. 214. Would it make any difference in her steering whether, if she drew 18 feet, there was 19 or 20 feet of water and she was going over a place on 19 or 20 feet of water,—or whether there was 25 feet of water?

A. Yes, I should say it would.

X Q. 215. Which would make difficulty in steering?

A. The shoal water.

Mr. Blodgett: The shoal water. That is all.

(By Mr. Pillsbury:)

X Q. 216. There is one more question I would like to ask you. You said that the tugs could be used in protecting her in the event of her coming off and could be placed so they could protect her if she did come off. What would be the way, assuming you had three tugs available, to place those tugs so they would be of the most assistance in the event of an unexpected floating of the ship?

A. Well, they would have to be placed, if the ship floated,—as long as they were there and had lines to her and were head to the current so they would handle themselves, I should say it would not make much difference as to just where they were on the ship.

X Q. 217. You think they should be placed at such a point that they would be quickly available in the event of her floating?

A. Yes, sir.

X Q. 218. Have you heard the evidence in the case that the lighter Salvor was alongside at the time she floated?

A. Yes, sir.

X Q. 219. Did you understand that to be the fact from Joseph Lewis?

A. As I recall it; yes, sir.

X Q. 220. And that one of the tugs was on the other side of the Salvor headed to the westward?

A. I am not familiar with that now; I do not recall just the location of those.

X Q. 221. Assume that for the moment, and assume that you were intending to have the tugs at the best point available; would that be the best point available for that particular tug?

A. I don't think it would be a serious matter one way or the other if the tugs were there close by where you could get them to hitch on to it.

381 X Q. 222. Would it be a good idea to have their engines running?

A. Before the ship floated?

X Q. 223. Yes.

A. I should say not.

X Q. 224. Would it be a good idea to have the ship's engines running if there were danger of its floating?

A. Before she floated?

X Q. 225. Yes.

A. No, sir.

X Q. 226. You heard the description of how these tugs were placed?

A. Yes, sir.

X Q. 227. How were they placed?

A. I don't recall exactly.

Mr. Pillsbury: That is all.

Redirect examination.

(By Mr. Park:)

Q. 228. Captain, was the relation of the tug and her placement with respect to the Bay Port before she came off very material, or not, as long as they were there and had up their steam?

A. No, sir; I think not.

Mr. Park: That is all.

JOSEPH I. KEMP (sworn).

(By Mr. Park:)

Q. 1. What is your full name?

A. Joseph I. Kemp.

Q. 2. And where do you reside?

A. Boston.

Q. 3. What is your present occupation?

A. Yard pilot and master of tugs in the Boston Navy Yard.

Q. 4. You are a licensed pilot on the Atlantic Coast?

A. Part of it; yes, sir.

Q. 5. And you have been how many years?

A. Twenty-seven.

Q. 6. And engaged in salvage and wrecking operations?

A. Yes, sir.

Q. 7. Of vessels on the coast?

A. Yes.

Q. 8. Do you know the Cape Cod Canal?

A. I have been through it a great many times.

Q. 9. As master of steamtugs and other vessels?

A. Yes, sir.

Q. 10. Government vessels?

A. Yes, sir.

Q. 11. And you have been familiar with it ever since it was opened?

A. I worked on it before it was opened.

382 Q. 12. You worked on it before it was opened?

A. On both entrances.

Q. 13. Do you know where the Bay Port went ashore on the 13th of December, 1916?

A. No, sir.

Q. 14. She went ashore in the canal about halfway through on the southerly bank. She went ashore at practically high water, and one tugboat was ahead of her. Her starboard side rested upon the rip-rap and she was taking in water much faster than her pumps could keep it out. She was parallel to the south bank. Steamtugs had been employed in the afternoon shortly after high water, two or three of them, to pull her off, and they were unable to remove her. On the following morning a diver was sent down, and he found a hole about four by eight inches in size under her starboard side, and he plugged up that hole and stopped the leak, and then her pumps commenced to gain on the water; and somewhere about 10 or 10.10 or 10.15 she floated. At that time three tugs were there and canal pilots were there. What I want to ask you now is as to what should be done while she was in charge of a professional salvage man—the T. A. Scott Company, by Captain Lewis—in order to get her off of her stranded position, from what experience you have had in assisting in salvage operations, in doing salvage work yourself, as a pilot and master of steamtugs and from your knowledge of the canal?

A. You would have to have the hole plugged up and the vessel pumped out to float her; and if she couldn't be floated by pumping the water out, to see about discharging the cargo.

Q. 15. That is what would have to be done?

A. Yes, sir.

Q. 16. Did you know Captain Joseph Lewis?

A. Yes, sir.

Q. 17. How long have you known him?

A. Twenty-seven years.

Q. 18. Did you know anything about his skill and ability as a wreck master in performing salvage operations?

A. I did.

Q. 19. You have seen him at work?

A. Yes, worked with him.

Q. 20. And worked with him? What can you say as to his skill and ability in salvage operations, from your knowledge?

A. I know of no man that could do better.

Q. 21. Captain, what would you say as to the advisability, 383 in trying to remove her from her stranded position, of making her fast to the bank on the south side of the canal?

A. I should say it would be a long, tedious job, requiring quite a few days of planting dead men and pumping the ship out and fastening and blocking the canal by putting lines across.

Q. 22. Would you have to put lines on the opposite side also?

A. Yes, sir.

Q. 23. And do you know how long that would have taken to have made her fast to the bank that way?

A. I should say several days.

Q. 24. What would have been the object of making her fast and keeping her on that bank?

A. No object whatever.

Q. 25. After the leak was stopped and the water in her hold was reduced, what next would you think should be done in order to relieve her from her stranded position?

A. Why, you would have to wait for the rising tide, which was rising at the time, as I understand it, and have the tugs in readiness to get the ship off.

Q. 26. Supposing these tugs had been heading to the westward and the tide was running to the eastward, what difference would it, in your opinion, have made which way they were heading, in order to take care of the ship when she came off?

A. They should have been heading,—to make them of use immediately,—they should be heading to the tide, or to the west.

Q. 27. Why?

A. So as to be in a position where they can slip into their positions where they wanted to, to keep the ship in the centre of the canal.

Q. 28. After the ship had got into deep water of the canal, with the tugs alongside, and the ship having steam up and in control of their engines, what was there to have prevented her being held in the deep water?

A. She could have been held there until the tide was slack or placed to the dolphins.

Q. 29. Are there any dolphins in that neighborhood?

A. I don't know just where she was aground the first time.

Q. 30. You know where she was grounded the second time?

A. I saw some of the wreckage on the bank.

Q. 31. She grounded the first time about a mile and a third or a quarter to the westward on the south bank. It is near station 230.

A. I don't know the canal by stations.

Q. 32. You don't know the canal by stations?

A. No, sir.

Q. 33. What object would there be in making her fast to the bank after the leak had been stopped and if her pumps were gaining on the water?

A. I could see no object whatever. I should say it would be a detriment to the ship.

Q. 34. While she was on the bank, with a list of ten or eleven degrees to port, and before the leak had been stopped, what particular danger was she exposed to?

A. To tearing another hole on the same ledge again, or the same rock that inflicted the first one, or others that would be in the immediate vicinity,—boulders.

Q. 35. Any danger of her capsizing in the canal?

A. I should say so.

Q. 36. Did you see the Watuppa when she was there?

A. No, sir.

Cross-examination.

(By Mr. Pillsbury:)

X Q. 37. As I understand you, your theory is, that when she floated she should have been held in the deep water of the canal and should not have proceeded either way in the canal,—that she should have been held there?

A. That would be according to her condition.

X Q. 38. Well, now, have you heard the description of her condition here; have you been in court?

A. Yes, sir.

X Q. 39. There was some water in her, and she was down at the head apparently. Having that in mind, what would you say?

A. I don't understand you, sir.

X Q. 40. Having that condition that I have described in mind, and saying that it would depend upon her condition as to what should be done, what should you say should be done?

A. I should say the condition would be, what the depth of the ship would be and what the depth of water in the canal was to take her out at that time of tide. If the ship was drawing so much water that she was very close to the bottom on some of the shoal spots they speak of in the canal, which have arisen since their stating of the 25 feet, it would have been policy to get the ship to the nearest set of dolphins and make her fast.

385 X Q. 41. That is, if I understand you correctly, in the emergency of the Ship's floating, those on the ship should have determined what her draft was, determined what the depth of water was, and determined whether there was any shoal spot which

might interfere with her steering, before settling on what course should be followed in keeping her safe; is that correct?

A. As I understand it, the ship was not in charge of a pilot while she was on the bank—

X Q. 42. Never mind the pilot for the minute. You understand the question? I want to get what course you think should be pursued when a ship in this condition suddenly floats,—what course should be pursued to insure as far as possible her not dashing herself on the bank again and meeting with some new accident.

A. If I was in charge of the wrecking expedition, I should have found out if there was sufficient water to go on with the ship, before I should decide on anything.

X Q. 43. How would you find that out?

A. I would have to confer with the pilot.

X Q. 44. In the meantime what would happen to the ship?

A. The ship would have to be held in position by the pilot and the tugs who have control of the ship.

X Q. 15. That is the first thing to do, in your opinion, is to hold her after she has come off,—to hold her right in the deep water where she came off?

A. You have to hold her head to the current.

X Q. 46. How would she be held in that way?

A. By the tugs making fast,—tugs on the bow,—which were, as I understand, lying on the port bow of the ship, and they would have been made fast with their usual lines. And the tug that would be on the quarter would have a hawser over his stern and over the ship's stern,—and the other tug would be either on the one stern or the other, to hold her, just as he did.

X Q. 47. That is, they should have fastened up the tugs in the way you have described, after she floated, and held her right there?

A. I don't know as you could hold her right there, but you could hold her in the middle of the canal.

386 X Q. 48. You know this is a 100-foot channel, do you not?

A. I have been through it; yes.

X Q. 49. You know there is a pretty swift current in the canal?

A. Not too swift.

X Q. 50. There is a current there?

A. There is a current there; yes.

X Q. 51. Do you think they could have done all those things without her hitting the other bank?

A. There is no doubt but what she might have touched the bottom at some portion, but she wouldn't stay there any time, because she wouldn't be rammed on.

X Q. 52. When she went off in this way, would you have started her engines?

A. You mean if I was in charge of the ship?

X Q. 53. Yes.

A. I wouldn't be in charge of the ship.

X Q. 54. Well, captain, you are testifying as an expert.

A. Yes, sir.

X Q. 55. And we are all depending on you to give us information.

A. Yes, sir.

X Q. 56. You are trying to tell us what ought to be done in this emergency. Now, would you, when she floated, have started her engines?

A. I don't think I should have, sir.

X Q. 57. Why not?

A. Because, if she floated off, the current had her, which was between three and three and a half knots, as I understand. In order to hold the ship with her own engines, you would have to give her more way over the bottom than the current was carrying her.

X Q. 58. And it was a mistake if those engines were started,—it was a mistake to start them, was it?

A. I should say it was, sir.

X Q. 59. With respect to tugs attending the scene of the accident when the ship was on the bank, as this ship has been described as being, how should they be placed to be best available in the case of the ship's floating?

A. I should say, as I have heard the evidence, that as these boats were lying would be about as near as anybody could place them if they had placed them the best.

X Q. 60. How do you understand they were lying?

A. I understand one was lying under the port bow, hanging on with one or more lines; and that there was another one along-
387 side of the lighter Salvor, which was on the port side of the ship. I don't know which way the Salvor was heading; that has not been spoken of.

X Q. 61. Where did you understand the other one was?

A. The other, I understand, was near the Salvor's bow or stern, whichever way she was heading,—heading with the tide to the west.

X Q. 62. And you think that is the best way to arrange them?

A. I should say so.

X Q. 63. Now, arranged in that way, how quickly would you expect they would be able to get their lines on the vessel in the way you have described?

A. Lying with their steam up, as they naturally should be, I should say inside of a period of three minutes.

X Q. 64. With the engines of the ship not started, what would be liable to happen to that ship in that period of three minutes after she floated in the canal, with a 100-foot channel and the current you have described?

A. When she floated off, she floated off broadside, going towards the centre of the channel. She may have drifted that way for ten minutes before touching either side.

X Q. 65. Do you think she would have?

A. She may have.

X Q. 66. I know she may have done anything, but what would be likely to happen to her?

A. She would suck along with the current, I should say.

X Q. 67. Assuming that she had so much water in her that she was well down at the head, would that make any difference as to how she would act?

A. I don't see that that would have anything to do with it if she were drifting.

X Q. 68. Would it have anything to do with it if she had her engines working?

A. I should say it would, with the engines working ahead.

X Q. 69. What effect would that have?

A. That her stern would naturally swing one way or the other, with the ship's engines working ahead against the rudder.

X Q. 70. That is, if she is down at the head, her stern would swing?

A. Yes, sir.

X Q. 71. Is that what we have been talking about as sheering?

A. Sheering is after she is under way.

388 X Q. 72. I know, but is sheering the stern swinging one way or the other?

A. Stern or bow, yes,—pivoting.

X Q. 73. She would tend to sheer if she was down at the head?

A. Under way; yes, sir; not afloat, but under way.

Mr. Pillsbury: That is all.

The Court: Could tugs have held her stern foremost in the current there?

The Witness: Yes, sir.

The Court: They could?

The Witness: Yes, sir. They could have held her head to the current.

The Court: No; but she came off stern to the current.

The Witness: Yes; but they could have held her stern to the current, and the tugs heading to the current.

The Court: I don't know that they could have held her in that special position, but they could have held her in the centre of the channel so she wouldn't slide against the bank, could they not?

The Witness: No, sir,—you see the current would be running quite fast by her.

The Court: Yes; but by pushing and pulling a little you say that the tugs could have kept her substantially there?

The Witness: Yes, sir, because as they gathered sternway on her, from the flow of the current, they would have sufficient way to manœuver the tugs if her engines remained quiet.

(By Mr. Blodgett:)

X Q. 74. Whether the tugs, when she came off, would hold her there or take her on through the canal, was a question of judgment, of course?

A. Yes, sir.

X Q. 75. And, as I understand you, the pilot who was on the vessel, who knew the canal, would be the one to determine whether or not the depth of the water was sufficient to take her through?

Mr. Pillsbury: I object to that. It asks for a conclusion.

The Court: I do not think it gets us ahead. We are dealing with that exact situation. Somebody must have made that decision.

Mr. Blodgett: Well, I will change the question.

X Q. 76. Assume that when the vessel came off, a pilot who was working on the canal—no matter in whose employ he was—
389 was on the vessel; that the vessel drew 18 feet, 2 inches aft, and was down by the head on account of some water inside of her,—some witnesses say she was down a foot by the head; assume that there was 25 feet of water at mean low water all through the rest of the canal and that it was about half tide, the tide being with the vessel: In your judgment, would the proper course under those circumstances have been for the vessel to go on and go through the canal?

A. I should say so.

X Q. 77. Assume that the depth of water at this point, along at 190 for a space of two or three hundred feet, was from 18 to 20 feet at mean low water, whether or not, in your judgment, it would be safe and prudent to take the vessel over such a shoal?

A. I should say not.

Mr. Blodgett: That is all.

(By Mr. Pillsbury:)

X Q. 78. That is, on the assumption Mr. Blodgett made, you would say that the tugs should not hold her in the deep water when she came off, but should proceed to take her through the canal.

A. If the water was sufficient in the mind of the pilot.

X Q. 79. If the water was enough in the canal?

A. Yes, sir.

X Q. 80. Even though she is down at the head so that she would sheer in the way that you have described?

A. Vessels will sheer in that shape in all channels.

X Q. 81. I say, your opinion is, that they should attempt to take her through the canal even though she is down at the head so that she will sheer from side to side in the way that you have described?

A. I should say they should.

X Q. 82. Why? Why not hold her in the deep water until you pump out the rest of the water that is in her?

A. How are you going to pump it out?

X Q. 83. You have got the same pump you have been using while she was on the bank?

A. I don't know where that is connected, whether it is forward or aft. You say she is down by the head. Most ships' pumps are located aft.

X Q. 84. Do you think this ship was not furnished with such a pump that she could pump that water out?

A. I don't know.

390 X Q. 85. The last question and answer, captain, were these: I asked you if you thought that this ship was not furnished with such a pump as would pump the water out of the forepart of it, and you said you did not know.

A. No, sir.

X Q. 86. Is it not usual, in a ship that is in proper seaworthy condition, to have pumps which reach to all parts of the ship?

A. Yes, sir; generally.

X Q. 87. So that if this ship were in proper condition, the pump would reach to the forepart as well as the rest of the ship,—if she was in proper condition?

A. Yes.

X Q. 88. Is it not usual to have places in ships for the purpose of introducing siphons if necessary?

A. I have seen it in wooden barges and in small sailing vessels.

X Q. 89. Are you familiar with the whaleback type?

A. Yes, sir.

X Q. 90. What has been your experience with whalebacks?

A. Why, nothing that was any different from any other ships that have been on the lakes.

X Q. 91. I mean, what has been your personal experience with them? Have you navigated them?

A. Yes, sir.

X Q. 92. Where?

A. In Boston Harbor.

X Q. 93. Have you ever navigated them on the lakes?

A. No, sir.

X Q. 94. Have you ever navigated a ship of the type of the Bay Port?

A. Yes, sir.

X Q. 95. What ship was that?

A. City of Everett.

X Q. 96. And who owned it?

A. Some coal company; I think Sprague had it chartered at that time; it belonged to some coal concern. She now is an oil steamer.

X Q. 97. When was that?

A. In 1902 or '3.

X Q. 98. In 1902 or '3 you handled her?

A. Yes, sir.

X Q. 99. Did you have occasion to take her through a narrow waterway with a swift current?

A. Yes, sir.

X Q. 100. Where?

A. Going into the Mystic piers, going through a drawbridge, going into South Boston, to the Metropolitan Company, across a current,—with a cross-current, on a narrow channel.

X Q. 101. Was she loaded, or light?

A. Loaded and light.

391 X Q. 102. Do you know to what depth she was loaded?

A. As I remember it, to about 20 feet,—19 or 20 feet.

X Q. 103. Now, the boat that you were familiar with had ballast tanks, did it?

A. That, I don't know.

X Q. 104. Don't you know whether this pig that you say you navigated yourself,—don't you know whether she had ballast tanks or not?

A. I was not captain of her; I was handling her as a tug master.
X Q. 105. Oh, I see.

A. I was not her master.

X Q. 106. I thought you were.

A. We took them after they arrived in the harbors.

X Q. 107. I see; all right. Now I will come back to this matter of the Bay Port. Will you indicate on a piece of paper for me how you think the tugs should have been placed in relation to the ship?

A. To do what?

X Q. 108. To be of assistance in the event of her floating.

A. To go on, or to hold her in the channel?

X Q. 109. Well, is there a difference in that respect?

A. Yes, sir.

X Q. 110. Then if you intended to go on, how would you have the tugs placed?

A. One tug ahead of the ship, and the other tug either astern or on one of the quarters to help steer her.

X Q. 111. When she is lying on the bank?

A. No; after she is afloat.

X Q. 112. I am asking you as to the position that the tugs should occupy in order to be in readiness to protect the ship and assist it when it floated.

A. To do what?

X Q. 113. To protect it and assist it.

A. They were in a good position then.

X Q. 114. Well, I am asking you what position you say the tugs should occupy for that purpose. Have you got an opinion as to how they should be placed?

A. I have an opinion of how they should be placed to hold the ship in the canal, or to go on in the canal.

X Q. 115. In order to know how the tugs should be placed in order to protect her if she floats, you have got to know
392 whether the intention is, when she floats, to take her through the canal or to hold her in deep water,—is that it?

A. Yes, sir.

X Q. 116. Then what position should you say they should be in if it is the intention to hold her in deep water?

A. The position that they were lying in at the time.

X Q. 117. And will you please indicate in a sketch how you understand that to be?

A. As they were?

X Q. 118. Yes.

A. [Drawing on a sheet of paper.] This would be the Salvor, the Stuart and the other two tugs.

X Q. 119. This would be on the south bank?

A. Yes, sir.

Mr. Pillsbury: Let me have another piece of paper, will you?

X Q. 120. [Passing the witness another sheet of paper.] Now,

will you indicate what position they should be in if they were to go on with the boat when she floated?

A. [Drawing on the sheet of paper.] I won't make any position for the second tug, because I consider she would be a free tug,—the third tug, I should say, would be a free tug to put anywhere as the emergency called for.

X Q. 121. Do you mind completing that line there a little bit?

[The witness completes the drawing.]

The Court: Which way is this to move her,—forward?

The Witness: To move her out of the canal.

X Q. 122. Now, captain, assume that one of these tugs was tied up to the Salvor,—that being the Salvor here [pointing].

A. Yes, sir.

X Q. 123. That would leave you with two tugs?

A. Yes, sir.

X Q. 124. And where would those two be placed?

A. Those two; that is, here [pointing to the first drawing]?

X Q. 125. Yes,—that is the one where you say the intention is to hold her in deep water. Where would that be placed if you intended to go on?

A. This tug here [pointing] would stay in that same position; this tug here [pointing] would have been placed here; this other tug would have been either here or alongside of the Salvor.

X Q. 126. That is the change that you would make in the sketch which you made for the position in the event that they were
393 going to hold her, is it?

A. That either this tug or that tug would be placed alongside of the ship in this position.

X Q. 127. When you say "either this tug or that tug," you indicate the tug that is nearest to the Salvor and the tug that is alongside of the Salvor; and you say that either one or the other should be shifted to the other end?

A. To this position.

X Q. 128. To the position that you indicate there?

A. Yes, sir.

X Q. 129. Well, then, what was the proper thing to do with the ship when she floated, if there was no plan whatever as to what should be done, would depend on the position that the tugs occupied at the time she floated?

A. It would depend upon what position the ship came off the bank into the centre of the canal, whether her stern dropped off first, or her bow dropped off first.

X Q. 130. How do you understand this happened?

A. I understand her stern went off into the deep water.

X Q. 131. On that assumption, what do you say?

A. I should say that this tug here [pointing] would be the quickest one to slip to this position.

X Q. 132. That is, the tug that is tied up to the Salvor?

A. Tied up to the Salvor,—if she was a large enough boat; I don't know the size of the boats or how they compared.

X Q. 133. That is, the first thing to be done would be to have the tug that was alongside of the Salvor shifted to the stern of the ship?

A. Yes, sir.

X Q. 134. For the purpose of getting a hawser on the stern and steadying her?

A. Yes, sir.

X Q. 135. That would be the first thing to do and the most important thing to do in that situation, would it not?

A. I should judge so; yes.

X Q. 136. Assume that the person who attempted to take charge of this situation, or who was in charge, ordered that tug to do something different from that, namely, to take the Salvor out of the way, and then changed that order and told him not to do it, but to take the Salvor and tow her somewhere, and gave him no orders whatever in relation to the Bay Port, would you say that was proper?

A. You have said the same thing twice——

394 Mr. Park: Is that predicated upon the evidence?

Mr. Pillsbury: Yes.

Mr. Park: The captain of the Stuart says he was first ordered to go to the stern and straighten out the stern of the Bay Port, and afterwards he was told to take the Salvor away. That was his testimony. But you stated it just to the contrary.

Mr. Pillsbury: The evidence as I recall it is, that there were two orders given by Joseph Lewis——

Mr. Park: I mean the captain of the John C. Stuart.

Mr. Pillsbury: —there were two orders given by Joseph Lewis in relation to this tug Stuart, which was the one alongside of the Salvor, and I thought I stated it correctly. If I did not, of course, if you made a note of that——

Mr. Park: In my examination I asked him what orders Captain Bill Lewis gave. He said the first order was to go along and straighten out the stern of the ship, and then he told him to take the lighter down and follow him.

Mr. Pillsbury: You may be entirely right.

Mr. Park: And I may be wrong.

Mr. Pillsbury: It is rather difficult sometimes to remember. However, I will strike out the question. It is in the nature of a conclusion, in any event.

X Q. 137. Now, captain, I want to ask you once more, taking the position that the tugs occupied as you have understood it and indicated it on this sketch——

A. I would like to state I was not here yesterday.

X Q. 138. Well, I am going to use this sketch for a moment, and then we will see how it compares. Taking the situation as you have indicated it on the first sketch, a tug outside of the Salvor and two other tugs alongside the Bay Port on the same side as the Salvor, what should you say should be done with the Bay Port when she went off,—should she be held in deep water, or should she be taken down the canal?

A. If there was water enough down the canal, I should say start her down the canal.

X Q. 139. I thought you said that the position that you indicated there for the tugs was the position that they should occupy if the intention was to keep her in the deep water of the canal and not go down the canal?

A. That is what I did.

X Q. 140. Well, if that is true, and the tugs occupied that position, you would think it was the thing to do to keep her there in the deep water, would you not?

A. I don't just get that.

X Q. 141. If the tugs occupied the position which you say they should occupy for the purpose of holding her, you wouldn't think the thing to do was not to hold her, would you?

A. I don't understand they were in that position to hold her.

X Q. 142. Is not that the position you say they ought to occupy if they were going to hold her in the deep water?

A. They couldn't in this position; no, sir.

X Q. 143. Well, what is the position you say they should occupy if you were going to hold her in the deep water?

A. I say that was the best available position for them to be in if the ship came off then and they wanted to be in a position to hold her in deep water.

X Q. 144. If they occupied that position, then, the best thing was to hold her in the deep water, was it not?

A. I wouldn't say that; I wouldn't answer that way.

X Q. 145. How would you answer?

A. They haven't had any orders, when in this position, to hold her in the deep water.

X Q. 146. We are trying to decide what orders should be given. What orders under those conditions do you say should be given?

A. If he wanted to hold her in the deep water and not go down the canal,—is that the way you want it?

X Q. 147. No; I am trying to see what should be done in this situation that you have described, whether the best thing to do would be to hold her in the deep water, or the best thing to do was to proceed down the canal?

A. I should say if the ship was in the proper condition to go down the canal and there was water enough to go,—to go ahead with the ship. I shouldn't hold her there.

X Q. 148. Suppose you assume she was not in proper condition to go down?

The Court: What Mr. Pillsbury means is, I suppose, when the ship came off the tugs were in fact so placed as we see them there,—taking that situation, what would you have done?

The Witness: I should have held the ship until there was some decision between the pilot and the man in charge of getting her off, as to what would be advisable to do with the ship. You have got to hold the ship in position until you come to some conclusion.

Mr. Pillsbury: I thank your Honor for getting at it.

(By Mr. Blodgett:)

X Q. 149. If you had known there was 25 feet of water at mean low water through the rest of the canal, and if the vessel drew a foot more forward than aft, and she was drawing 18 feet, 2, aft, what would you have thought was the thing to do?

A. I should have judged it would be advisable to go along with the ship through the canal, placing tugs in position with the ship, on the quarter, to assist in steering.

X Q. 150. You were asked something about siphons. Do you know of any iron or steel vessels, cargo carriers, that have a space to put a siphon down besides their own pump, where they have a steam pump?

A. A provisional space,—an additional space?

X Q. 151. Yes.

A. No, sir, I don't know of any.

X Q. 152. You say you have seen whalebacks and seen them operated?

A. Yes, sir.

X Q. 153. How do they operate in still water?

A. Very good.

X Q. 154. On the open ocean, in a seaway, they will yaw, will they not?

A. Not much more than other vessels,—presumably a little.

X Q. 155. And, from your experience with whalebacks, they load to about 19 or 20 feet depth?

A. Between 17 and $1\frac{1}{2}$ and 21 feet is what I have seen them.

X Q. 156. Do you think it is possible to tell where you have plenty of water under you, by steering, whether or not your vessel is drawing 18 feet or 17 feet?

A. Not unless you have plenty of speed on your ship.

X Q. 157. If you are going very fast you can tell?

A. Yes, sir.

X Q. 158. What do you mean by "very fast"?

A. Something over three or four knots,—five knots through the water.

Mr. Blodgett: That is all.

397 Mr. Pillsbury: I will have this sketch marked that the captain has been referring to,—that is, the first one. Perhaps we had better mark both of them.

[The two sketches are marked, respectively, as "Canal Company Exhibits "17" and "18."]

EDWARD R. GEER (sworn).

(By Mr. Park:)

Q. 1. Captain Geer, what is your full name?

A. Edward R. Geer.

Q. 2. You are a licensed master and pilot?

A. Yes, sir.

Q. 3. Of vessels of what class?

A. All classes.

Q. 4. And you have been how long?

A. Twenty years; that is, almost twenty years pilot.

Q. 5. Are you now employed by the New England Navigation Company?

A. Yes.

Q. 6. Master of the various Sound boats of that company?

A. Yes, sir.

Q. 7. Including all the lines; in other words, on the lines running between Boston, Fall River, Newport and New London?

A. Yes, sir.

Q. 8. You have been on all of them?

A. Yes, sir.

Q. 9. And on nearly all the boats?

A. Yes, sir.

Q. 10. Of what boat are you master at the present time?

A. I am on my vacation now, sir.

Q. 11. This week?

A. This week.

Q. 12. What boat were you on last week?

A. I was on the Chester W. Chapin.

Q. 13. Running from New York to New London, a Sound boat?

A. Yes, sir.

Q. 14. Were you connected with the Cape Cod Canal during the year 1916?

A. Yes, sir.

Q. 15. When did you first go there, captain?

A. About the 14th of February.

Q. 16. 1916?

A. 1916.

Q. 17. How long were you there?

A. Until the 1st of February, 1917.

398 Q. 18. And what was your position at the canal?

A. Superintendent.

Q. 19. And what were your duties as superintendent?

A. To take charge of all vessels that went through the canal.

Q. 20. Are you familiar with the canal?

A. Quite; yes, sir.

Q. 21. Are you a licensed pilot on the canal?

A. Yes, sir.

Q. 22. Who had charge of the Cape Cod Canal pilots, so called, Rochester and Lewis and Wagner?

A. Well, I believe they said I was sort of a manager.

Q. 23. Did you direct them what to do or not to do?

A. Yes, sir.

Q. 24. And who directed the captains of the various steamtugs, the three steamtugs, Stuart, Dalzelline and Hazelton, as to their operations?

A. Captain Lewis,—when I went there I appointed him,—Captain William Lewis,—as managing captain.

Q. 25. As managing captain?

A. Yes,—paid him \$25 more a month than the rest of the captains; and he had full charge and gave orders how the tows and everything should go through the canal.

Q. 26. Was that in your presence or when you were not there?

A. When I was not there.

Q. 27. In your absence, pilot Lewis was the managing captain?

A. Yes, sir.

Q. 28. He had full charge, you mean, of the operations of towing through the canal?

A. Yes, sir; placing the tugboats, etc., unless I told them myself.

Mr. Pillsbury: Do I understand Captain Geer to testify that that was when he went there that he did that?

The Witness: That was the whole year that I was there, sir.

Q. 29. Do you know the Bay Port, captain?

A. Yes, sir.

Q. 30. And did you know about her going through the canal on the 13th of December, 1916?

A. Yes, sir.

Q. 31. Do you know what pilot was in charge?

A. Rochester.

Q. 32. Do you know what steamtug had her?

A. The Dalzelline was towing ahead.

Q. 33. Do you know how much water she drew?

A. Eighteen feet, 3, if I recollect right.

399 Q. 34. Did you hear of her mishap on the 13th?

A. Yes, sir.

Q. 35. At that time where were you?

A. I was at the office.

Q. 36. At the west end of the canal?

A. Yes, sir; Buzzard's Bay.

Q. 37. At the canal office, you mean?

A. Yes, sir.

Q. 38. How many different offices were there in that building, if any, besides the canal office?

A. There were three rooms; that is, three rooms downstairs, and one room upstairs.

Q. 39. Is there one room used exclusively by the Pilots' Association?

A. That was in an adjoining house,—not adjoining house; a house within 20 feet of the canal office.

Q. 40. But it was not in the canal office?

A. Not in the canal office.

Q. 41. Did the Towing Corporation have an office all by itself?

A. Yes, sir.

Q. 42. Was it in that building, or some other building?

A. In the other building.

Q. 43. That was in the other building also?

A. Yes, sir.

Q. 44. As superintendent, were vessels permitted to navigate the waters of the canal without a licensed pilot or one of the Cape Cod pilots, so called, in charge, or not?

A. No, sir, they were not.

Mr. Pillsbury: I would like to have you fix the time that you are speaking of, because this matter changed from time to time.

Mr. Park: I refer to the time the Bay Port went ashore.

Mr. Pillsbury: Will you put the question in that form?

Q. 45. At the time the Bay Port went ashore were any vessels permitted to navigate the canal without the presence of a canal pilot on board who had charge of her, or not?

A. He has got to have a license,—United States license.

Mr. Pillsbury: Wait a moment.

The Court: Oh, that is all right.

The Witness: A United States license,—he has got to have a United States license, or else he wasn't allowed to go through the canal.

Q. 46. And did the canal pilots, Rochester, Lewis and Wagner, have United States licenses?

A. Yes, sir.

400 Q. 47. And at the same time did they have a canal license issued by the canal?

A. Yes, sir.

Q. 48. Both?

A. Yes, sir.

Q. 49. Now, what tugboats did you have at that time at the canal?

A. John C. Stuart, the Dalzelline and the Hazelton.

Q. 50. And who had charge of them? I do not mean who were their masters, but who had charge of them?

A. I had charge of those,—full charge.

Q. 51. You had charge. Did you hold any office in the Cape Towing Corporation?

A. They told me I was manager of that.

Q. 52. Who told you that?

A. Why, I believe they elected me when they held a meeting.

Q. 53. Who told you that, captain, do you remember?

A. Mr. Coakley, Mr. Maass, Captain Rochester, pilot Lewis and Captain Bertsche.

Mr. Blodgett: Do you understand he is referring to the Pilots' Association?

Mr. Park: No; I mean the Tugboat Association.

The Witness: Oh, that is the Pilots' Association.

Mr. Park: I mean the Tugboat Association.

The Witness: Commodore Miller told me,—the vice-president,—that I was manager,—they appointed me manager.

Q. 54. Of the Tugboat Association?

A. Of the Tugboat Association.

Q. 55. One of the exhibits filed in this case by the Canal Company is a contract between the Canal Company and the Towing Corporation in which the services of the manager were to be paid for by the Towing Corporation. Did you receive any compensation as manager of that Cape Towing Corporation?

A. Not one cent; no, sir.

Q. 56. Not one cent. Now, on the 13th of December, 1916, and for the year previous thereto, in fact during the time that you were there, had you issued any orders as to the navigation of vessels through the canal?

A. Yes, sir.

Q. 57. Did you, as superintendent, permit any vessel to
401 navigate the canal except they were in charge of one of the pilots of the canal?

A. Not unless they had a license.

Q. 58. You mean from the United States Government?

A. From the United States Government; and before the United States Government issued the canal licenses they had to have a license of some kind.

Q. 59. Did you know Captain Joseph Lewis?

A. Very well; yes, sir.

Q. 60. How long had you known him?

A. Three or four years.

Q. 61. And did you know him in connection with his operations in the canal, or outside of it?

A. Well, I knew him outside of it; and also from the operations in the canal.

Q. 62. Did he have a license for that canal or not?

A. He did not; no, sir.

Q. 63. Were there any occasions while you were there and previous to December 13th, 1916, when he had vessels to go through the canal, in which you had conversation with him?

A. Yes, sir.

Q. 64. Will you state what that conversation was?

Mr. Pillsbury: Just a moment. This is previous to the accident?

Mr. Park: During the whole time he was there.

Mr. Pillsbury: I do not see the point.

The Court: What do you expect to show?

Mr. Park: I expect to show that when Captain Lewis had some wrecks and other vessels that he wanted to take through the canal he was denied that privilege by the superintendent and told he could not take them through; that it had to be in charge of one of their boats and one of their pilots.

The Court: I think that fact may be proved, but I think it should be proved directly by asking the witness if that is not so, instead of indirectly.

Mr. Park: Well, I did not want to lead him.

Q. 65. Did Captain Lewis make application to you to take any vessels through the canal while you were there?

A. Yes.

Q. 66. What boat was that?

A. Chippewa.

Q. 67. Had she been salved by the Scott Company?

A. By the Scott Company; yes, sir; at Wing's Neck.

402 Q. 68. And he wanted to go through the canal to the east?

A. Yes, sir.

Q. 69. Did you permit him to take her through, or not?

A. I did not.

Q. 70. Under what conditions did she go through?

A. Under an order that I gave to pilot Lewis, telling him how to put the tugboats alongside of her. And I asked Captain Lewis if he would loan us,—he had one of the Boston towboats at that time,—if he would loan us her; Captain Kemp was captain of her, and he was a real canal pilot, and I let him go alongside of the ship; placed the tugboats alongside of the ship according to my orders, of course, to Captain Lewis,—that is Captain William G. Lewis. So he had charge of the ship going through the canal.

Q. 71. And was he on the Chippewa going through,—on the bridge?

A. Yes, sir.

Q. 72. On another occasion did you know of Captain Lewis being there with a German steamer of the Hamburg line that wanted to go from Boston through the canal to the west?

A. Yes, sir.

Q. 73. And did you permit him to take charge of that boat going through?

A. I did not, sir.

Q. 74. Who did take charge of the boat?

A. I did, sir; I took her through, myself.

Q. 75. You went up on the bridge and navigated her through the canal?

A. Yes, sir.

Q. 76. What did you tell him?

A. I told him, after I came there—he took her as far as the canal—when I came there I said, "Captain Lewis, I have charge of her now," and he stood on the bridge, but of course had no right to give any orders. He was there on the bridge as captain of the ship.

Q. 77. You gave all the orders for navigating through the canal?

A. Yes, sir.

Q. 78. And that was while you were superintendent of the canal?

A. Yes, sir.

Q. 79. Previous to December 13, 1916?

A. Yes, sir.

403 Q. 80. Now, when you heard the Bay Port was ashore, what did you do?

A. I got into the automobile and went down to where she was ashore, on the opposite shore.

Q. 81. And did you see her?

A. Yes, sir.

Q. 82. Where was she stranded,—at 230?

A. She was stranded where the—what they call the "graveyard."

Now, I can't tell exactly the station, but I think it is somewhere around 230.

Q. 83. And that is on the south side of the canal?

A. South side of the canal.

Q. 84. How was she lying in regard to the bank of the canal?

A. She was lying parallel with the bank of the canal.

Q. 85. Were there any tugboats there at that time?

A. Yes, they was all there.

Q. 86. Did you give any instructions that afternoon as to what to do with the boat, if anything?

A. When I arrived, I hollered to Captain Lewis,—I saw him—

Q. 87. Which Lewis?

A. William Lewis.

Q. 88. Please refer to him as "pilot Lewis."

A. —and I asked him if there was a suction on,—if they had a suction on. He said: "No, there is no place to put a suction in the ship." Then I gave orders to the Stuart,—he was on ahead pulling almost parallel to the ship,—I gave him orders to starboard his wheel and pull across the canal and see if he could pull her off the bank; and he then pulled and parted his line. In fact all the tugboats at the same time were pulling. But the tide was falling then after that, and I gave it up.

Q. 89. Did you know at that time that the boat was leaking?

A. Yes, sir.

Q. 90. What instructions, if any, did you give to any of them as to what to do if she came off?

A. To get her through the canal just as soon as possible.

Q. 91. To whom did you give that instruction?

A. Pilot Lewis.

Q. 92. When the three towboats were not able to get her from the bank, and you knew she was leaking, did you consider her situation serious; I mean, the situation of the Bay Port?

A. Yes, sir, I did.

Q. 93. And did you call anybody by 'phone?

A. I called Captain Lewis,—Captain Joseph Lewis,—I
404 called the Scott wrecking people, and I got hold of Captain Lewis, and he said he had got orders to come down by the noon train from the owners of the ship, or the underwriters, I have forgotten which,—the owners of the ship I think.

Q. 94. When he came down there, were you there?

A. I was there; yes, sir.

Q. 95. Did you see him that evening?

A. Yes, sir; I met him.

Q. 96. Did you state to him anything about giving him the use of the tugboats if he wanted them to get her off?

A. I told all the captains that had charge of the tugboats to do everything they could, everything that Captain Lewis wanted them to or anything that he wanted them to do.

Mr. Pillsbury: Was that in Joseph Lewis' presence?

The Witness: Yes, sir; Joseph Lewis'.

Q. 97. And you did not go down there again that night?

A. No, sir.

Q. 98. Did you give any instructions at all to the day captains?

A. No, sir; in fact, I never saw the day captains.

Q. 99. Is the Stuart a large, powerful boat?

A. Yes, sir.

Q. 100. Much larger than the others?

A. Yes; she is very powerful.

Q. 101. Had the Bay Port gone through there before that time, while carrying a cargo?

A. No, sir; she had been through light two or three times,—I think three times,—previous to that.

Q. 102. Every time she had been through light, did she go from east to west?

A. East to west; yes, sir.

Q. 103. On the following morning, captain, what did you do, if anything,—on the 14th?

A. The following morning I went down to the office; I heard that she had not sunk in the canal. I went down to the office, and I asked the clerk,—said I: "Where is pilot Lewis?" And he says: "He is down at the wreck." I said: "All right," like that. And I think Commodore Miller came down that morning and we got to talking, and I never went to the wreck after that. I thought if there was anything that turned up they would call me up from the ferry, which was close by.

405 Q. 104. Did you know of the three tugboats being there?

A. Yes, sir; they were there standing by.

Q. 105. Did you hear that she had floated from the bank?

A. I heard it through a telephone from the ferry; they called up and said that the Bay Port was going down by the ferry; Commodore Miller was there at the same time.

Q. 106. When she came off the bank, with the hole on her star-board side plugged up and her own pumps having control of her, pilot Lewis was on board?

A. Yes, sir.

Q. 107. And the three tugboats were alongside?

A. Yes, sir.

Q. 108. In that situation who had charge of the navigation of that ship through the canal?

Mr. Pillsbury: I think that is purely a question of law.

Mr. Park: It is a question of fact.

The Court: I think he may state; yes.

Mr. Pillsbury: Will your Honor save my exception?

The Court: Yes, I will save your exception.

A. Just as soon as that ship left the bank, pilot Lewis was in full charge and would give the orders, whatever he saw fit; he had full charge of everything just as soon as she left the bank.

Q. 109. He had charge of vessels going through the canal?

A. Yes, sir; that is a well-known fact amongst all the pilots and captains of the tugboats, that where Captain William Lewis—pilot

Lewis—was, that he had full charge. That is what he got the extra money for.

Q. 110. When did you hear she was ashore again, captain.

A. Very shortly afterward, not over a minute or two, they called up.

Q. 111. And you went down where she was?

A. Yes, sir; Commodore Miller and I got into the machine and went down on the opposite side, on the west side of the channel.

Q. 112. I understood you to say that on the afternoon of the 13th, when the three tugs were trying to get her off, you gave instructions that if she came off into the canal they were to get her in the channel and get her out of the canal as soon as they could?

A. Get her out of the canal as soon as possible.

Q. 113. At that time you did not know how serious the
406 leak was or what the damaged condition was on her starboard side at all?

A. No, sir.

Q. 114. And you did that before any examination had been made to see the extent of her damage?

A. Yes, sir.

The Court: You told that to W. T. Lewis, the pilot, I understand?

The Witness: Yes, sir.

The Court: The evening before?

The Witness: What do you mean,—the night she went ashore?

The Court: Yes.

The Witness: Yes, sir.

Q. 115. Where was pilot Lewis at that time?

A. He was on the Bay Port.

Q. 116. He was on the Bay Port?

A. Yes.

Q. 117. I understand, from what you say, captain, that when you were not there pilot Lewis, by virtue of his seniority and rank and pay, had command?

A. He had command; yes.

Q. 118. And when you were there, you took it?

A. Yes, sir.

Cross-examination.

(By Mr. Blodgett:)

X Q. 119. Captain, had you had any talk, prior to this accident, with Commodore Miller in reference to the condition of the bottom of the canal?

A. Yes, sir; a great many times.

Mr. Pillsbury: I have already stated that we do not contend that the company did not know of the condition, so I do not think you need to go into this. I admitted it in connection with the other witness, Dunbar.

Mr. Blodgett: If my brother admits that it was unsafe to take this boat through, I am perfectly willing to take that admission and not ask the question.

Mr. Pillsbury: Of course I do not admit anything of the sort. I admit that whatever the conditions were that existed, that fact or those facts were known to the Canal Company and to the officers of the company. I do not suppose the conversation that they had would prove whether it was dangerous to take a boat through or not.

407 X Q. 120. Captain, after July 1st of that year, and before the accident, did you have any talks with Commodore Miller in reference to the advisability, with the canal in the condition it was, of taking through these lake-built pig barges or steamers loaded?

A. Yes, sir; I told him it was not safe to take them through.

X Q. 121. And what did he say to you?

A. He says: "You have got to take them through, because Mr. Belmont says that we have got to get the money to pay the interest on the bonds."

X Q. 122. And when this Bay Port came up you gave instructions to allow her to go through?

A. Yes, sir.

X Q. 123. In accordance with your conversation with Commodore Miller?

A. Yes, sir.

X Q. 124. Whom did you give instructions to?

A. Rochester, who took her through.

X Q. 125. Did you ever have any salary from the so-called "Pilots' Association"?

A. No, sir; not one cent.

X Q. 126. So far as you knew, did you ever sign any agreement of association?

A. No, sir.

X Q. 127. I understood you to testify you had no salary from the Towing Corporation?

A. Nor from the Towing Corporation; no, sir; my salary remained the same from the time I first went there.

X Q. 128. And how about the salaries of these tugboat captains and pilots; were they changed after the organization of the Tugboat Association, as far as you know?

A. No, sir; they were just the same as long as I was there.

X Q. 129. Prior to the organization of these companies they had been in the employ of the Canal Company?

A. Yes, sir.

X Q. 130. Direct?

A. Yes, sir.

X Q. 131. Now, did you see the boat going through that day?

A. Yes, sir; I was in the office when she went by,—Buzzard's Bay office.

X Q. 132. So far as you could see, was she going properly?

A. Yes, she was going all right.

X Q. 133. Did she appear to be steering properly?

A. Yes.

X Q. 134. Did you know of the existence of any knuckle or
408 current around a knuckle up near section 230 or 235?

A. Yes, sir; because I have heard all the pilots speak about that place.

X Q. 135. And on a vessel running to the eastward against a head tide, what effect, if any, would the current have on the vessel around that knuckle; would it have a tendency to make her sheer either way?

A. Yes, it is apt to strike,—the tide to strike her on the port bow and give her a sheer over to the south bank.

X Q. 136. Over to starboard?

A. To starboard.

X Q. 137. You say that there was no place to put a suction pipe in the Bay Port. Do you know of any cargo steamers that have an additional space to put a suction pipe in?

A. No, sir, I do not.—I don't know of any.

X Q. 138. As far as you know?

A. As far as I know.

X Q. 139. So far as you know, she had her own pumps, regular pumps?

A. Yes, sir; they said her own pumps were going.

X Q. 140. This was the first time the Bay Port had been through loaded, was it not?

A. Yes, sir.

X Q. 141. Were you present after this accident when Commodore Miller talked with Rochester and William Lewis about the accident?

A. Yes, sir, I was present some of the time; most of the time.

X Q. 142. Did you hear any complaint made by them at that time that the vessel sheered except just before each accident?

A. They always sheered on that turn there.

X Q. 143. On that turn?

A. Yes.

X Q. 144. But I say, except before each of the accidents, did you hear any complaint that the vessel had been sheering before she came into the canal, outside?

A. Before this accident?

X Q. 145. Yes.

A. No, sir; Captain Rochester said she steered along fine until she got up there and took that sheer and went on the bank.

X Q. 146. You say that you gave orders to get her out as quick as possible, out of the canal?

A. Yes, sir; that first night she went ashore.

X Q. 147. Was that when she first went ashore?

A. Yes, sir; to get her off,—I said: "Get her off as quick as you can."

409 X Q. 148. To whom did you give those orders?

A. William Lewis; he was standing on the deck; I hollered to him.

X Q. 149. Was Commodore Miller with you at the time?

A. No, sir.

X Q. 150. Where was Commodore Miller at that time?

A. He had not arrived, I think.

X Q. 151. He had not arrived. Did Commodore Miller arrive before the vessel came off the first time.

A. He arrived, I think, the next morning on that first train, but I am not positive whether he went up or not to the wreck; I couldn't say as to that,—before she came off.

X Q. 152. Had you had any orders from Commodore Miller in reference to what to do with a vessel if she got in trouble in the canal?

A. No more than he says,—he always said: "Notify the insurance people."

X Q. 153. I mean about getting her out or doing anything with her; had you had any instructions from Commodore Miller prior to the accident?

A. No, sir, I don't think I did; I don't remember any, sir.

X Q. 154. In giving the orders that you have testified to and doing the things that you did, in what capacity were you acting?

A. Well, it is hard to tell. I received a salary for the superintendency of the Cape Cod Canal, but they said I was manager of the Towboat Company and the Pilots' Association,—but I received no salary for it. I should judge that when I gave the orders I was acting as superintendent of the canal; that is the only position I really—or that I held.

X Q. 155. Did you control the putting up of the flag at Wing's Neck for the purpose of allowing vessels to come through the canal?

A. Yes, sir.

X Q. 156. And that was done by the Canal Company?

A. Yes, sir.

X Q. 157. And what did the setting of that flag mean?

A. Well, if it is a red flag, it is to stop; a white flag, why, come along.

X Q. 158. Come along?

A. Yes, sir.

410 X Q. 159. The Canal Company absolutely controlled the passing through of the vessels?

A. Yes, sir.

X Q. 160. And you had a telephone from Wing's Neck that you received that the Bay Port was there?

A. Yes, sir.

X Q. 161. And then, when you got ready to let her come through, you had the flag set for her to come through?

A. Yes, sir.

X Q. 162. Meanwhile you had ordered Rochester to go down to her?

A. Yes, sir.

X Q. 163. Do you know whether these vessels of the lake type, "pig type," so called,—whether the business of those vessels was solicited in the canal?

A. Yes, they were.

X Q. 164. By whose order?

A. By Commodore Miller. He appointed a man by the name of Mr. Value, who was paid a salary to go around and solicit the business.

X Q. 165. And how long was that before this accident?

A. Oh, I think probably six months.

X Q. 166. Did you ever hear pilot William T. Lewis say in your presence and in Commodore Miller's presence that he knew of the existence of a knuckle in the locality between 230 and 235, and that he knew how badly vessels behaved there?

A. Yes, sir; many times.

(By Mr. Pillsbury:)

X Q. 167. You say you left the canal service when, Mr. Geer?

A. The 1st of February, 1917.

X Q. 168. What was the occasion of your leaving?

A. Because I couldn't have my way. I was hired to be responsible for vessels that went through the canal. I found out I couldn't have my way there, and this trouble was happening right along, so I resigned.

X Q. 169. That is, you resigned because you could not have your own way at the canal; is that it?

A. My own judgment, which I was supposed to be paid for.

X Q. 170. What were your relations with Commodore Miller and the other officers of the canal?

A. Very good; fine.

X Q. 171. You always liked Commodore Miller very much?

A. Yes, sir; one of my best friends.

X Q. 172. Very friendly with him?

A. One of my very best friends; yes, sir.

411 X Q. 173. You felt that he was the one that was at fault for not giving you a free hand at the canal?

A. I couldn't say whether he was or not.

X Q. 174. Who did you think was at fault for it?

A. I did not know. I didn't have it, anyhow; the orders came through him that we would have to do certain things.

X Q. 175. Who did you think was responsible for it?

A. That certain things that I wanted to do, I couldn't do?

X Q. 176. Yes; who did you think was responsible for not allowing you the free hand that you thought you ought to have?

A. I had no right to think. I got my orders from Commodore Miller.

X Q. 177. You thought he was the one that was responsible?

A. Well, that is whom I got my orders from.

X Q. 178. The only reason you resigned was because you couldn't have your own way?

A. I had a reputation; I didn't want to lose it there.

X Q. 179. You thought you were going to lose your reputation if you stayed?

A. I would if I stayed there, probably.

X Q. 180. There was no question of money involved, was there,

about your salary; no question as to your salary involved,—as to your leaving?

A. About a month before I left I asked Commodore Miller for a raise of a thousand dollars a year. Well, I received no answer from it; and then about a week after that I sent in my resignation. I had received no raise.

X Q. 181. A month before, you asked him for a raise of a thousand dollars a year?

A. Yes, sir.

X Q. 182. How long before you left was it that you were not allowed to have your own way, and you wanted to resign on that account?

A. At the time the first accident happened, to the Chisholm.

X Q. 183. If they had given you a raise of a thousand dollars, was it your intention to stay?

A. No, I wouldn't have stayed if they had given me ten thousand more.

X Q. 184. Why not?

A. Because I wouldn't.

X Q. 185. That is, you felt so strongly about leaving that you
412 would not have stayed if they had given you ten thousand more?

A. I wouldn't have stayed; no, sir.

X Q. 186. Then why did you ask for a raise of a thousand dollars, if you would not stay anyhow?

A. I changed my mind after I asked for it.

X Q. 187. You asked a month before you left for a raise of a thousand dollars and never got any reply to it at all, did you?

A. No, sir.

X Q. 188. In the very letter in which you asked for a raise of a thousand dollars did you not tell Commodore Miller that you thought the Canal Company might be responsible in this Bay Port case?

A. I don't recollect about that.

X Q. 189. Will you say you did not?

A. I don't recollect about that.

X Q. 190. Will you say that in the letter that you wrote asking for a raise of a thousand dollars you did not talk about this Bay Port case?

A. I don't remember, sir.

X Q. 191. Will you say that you did not say it?

A. I don't remember.

X Q. 192. Have you got any letters from Commodore Miller to you?

A. Have I got any letters from Commodore Miller to me?

X Q. 193. Yes.

A. No, sir.

X Q. 194. Any letters that he ever wrote you while you were there?

A. Yes, I have had them; but when I left the canal I destroyed all the personal letters that I had.

X Q. 195. Where were your so-called "personal" letters kept at the canal?

A. They were kept in a certain box outside, in a file.

X Q. 196. How was that file marked?

A. I couldn't say.

X Q. 197. Was there a file marked "Bay Port" at the canal while you were there?

A. I couldn't say.

X Q. 198. Don't you know whether you had any file in your office marked "Bay Port"?

A. I didn't take care of that part at all.

X Q. 199. You do not know whether there was any file of that kind?

A. No, sir.

X Q. 200. You do not remember ever seeing any file there
413 in this Bay Port case at the canal office?

A. I do not. I saw some statements, if that is what you call a file.

X Q. 201. Did you see any file? Didn't you have files, so called, at the canal office in this case?

A. We had statements about the Bay Port.

X Q. 202. Were they not kept in a file?

A. I couldn't say whether it was a file or what. The clerk took care of that,—that is all I know.

X Q. 203. You don't know whether you had files of your cases at the canal office or not?

A. No; that is something I had nothing to do with. I just managed the running of the place,—the canal. The clerical end the clerk took care of himself.

X Q. 204. Did you ever see any file in any case at the canal office?

A. I saw some statements.

X Q. 205. Were they anything in the form of files marked with the name of the case?

A. I couldn't say; the clerk took care of those.

X Q. 206. Well, when did you last see these statements?

A. When they were made.

X Q. 207. When did you last see them, Mr. Geer?

A. Oh, before I left the canal.

X Q. 208. How long before you left the canal?

A. Probably I saw them when they was first made out,—and I haven't seen them since,—that is, shortly after the—

X Q. 209. Was there a file there which was a duplicate, or substantially a duplicate, of the file that was in the New York office in these matters?

A. I don't know what was kept in the New York office. We had some statements there from the pilots.

X Q. 210. Don't you know a little more about the files than you are telling us now?

A. I don't know nothing; the clerk looked after that part of it. I had nothing to do with the files at all.

X Q. 211. Didn't you have occasion to consult your files?

A. No, sir; not at all.

X Q. 212. No occasion to consult those?

A. No, sir; never had any occasion.

414 X Q. 213. When letters came from Commodore Miller in the Bay Port case, for instance, or any other case, what would you do with those letters?

A. Give them to the clerk and he took care of them.

X Q. 214. What would the clerk do with them?

A. I don't know.

X Q. 215. Was this your clerk?

A. No; he was the clerk for the Canal Company.

X Q. 216. You were superintendent of the canal?

A. Yes, but I was hired—

X Q. 217. He was your clerk, was he not, under you?

A. He was under me in a way; yes.

X Q. 218. Well, you don't know what he did with those letters?

A. No, I don't.

X Q. 219. When you wanted to see these letters, what would you do?

A. I never wanted to see them.

X Q. 220. Why not? Didn't you ever have occasion to refer to any letters that came in?

A. Very seldom,—very seldom.

X Q. 221. What did you do when you wanted to answer them?

A. All letters that came in was answered that day they came, and then the other letter was given to the clerk and where he put them I couldn't say.

X Q. 222. In your letter to Commodore Miller asking for a raise of a thousand dollars, what was the occasion of referring to the Bay Port case?

A. I don't remember of referring to the Bay Port case at all in that letter.

X Q. 223. There would not be any possible connection with your request for a raise of a thousand dollars and the Bay Port case, would there; there would be no reason for your referring to the Bay Port case when you were asking for a raise of salary, would there?

A. Why, I don't see why I should.

X Q. 224. You can't see any reason for it whatever, can you?

A. I don't see why I should.

X Q. 225. At about the same time did you write Mr. August Belmont a letter in relation to your position at the canal?

A. I don't think I ever wrote to Mr. Belmont.

X Q. 226. Never wrote to him at all about anything?

415 A. I don't think I ever did, because I always looked to my superior, Commodore Miller, who was vice-president, and I looked to him.

X Q. 227. Will you look at this letter?

A. But I might possibly have done it.

X Q. 228. Let us find out. Look at the letter and see [passing the witness a letter].

A. Well, yes, I wrote that,—yes.

X Q. 229. That was about a month before you left, was it?

A. Let us see [looking at the letter]. Yes; a couple of weeks.

X Q. 230. A couple of weeks before you left, and about the time you were taking up with Commodore Miller the matter of your salary?

A. I don't remember exactly; somewhere probably a month or so.

Mr. Pillsbury: That letter is dated January 19, 1917, and is addressed to Mr. August Belmont.

[Mr. Pillsbury reads the letter, and it is marked as "Cape Cod Canal Company Exhibit 19."]

X Q. 231. Did you get any reply to that letter, Mr. Geer?

A. I don't think I did, sir,—no, sir.

X Q. 232. Didn't you remember writing August Belmont, asking him to make you general manager of the canal?

A. I didn't until I saw the letter.

X Q. 233. It had entirely faded from your mind, had it?

A. Yes, it had.

X Q. 234. You got no reply from Commodore Miller to the letter which you wrote him asking for an increase in salary?

A. I think he came up shortly after that and spoke about it, but I don't remember,—he might have written.

X Q. 235. Now, think again, Mr. Geer, as to whether, in your talks or letters to Commodore Miller in connection with the raise of a thousand dollars in your salary, you did not talk about this Bay Port case?

A. I couldn't say; I have forgotten.

X Q. 236. Do you remember of talking about any of the other cases that were then pending for trial?

A. I have forgotten all about that.

X Q. 237. You were a good deal disappointed when you
416 did not get any reply from Commodore Miller about your increase that you asked for, were you not?

A. No, I was not disappointed.

X Q. 238. Didn't care anything about it?

A. No, I didn't.

X Q. 239. Just a mere passing matter?

A. I didn't care anything about it.

X Q. 240. Were you at all disappointed when you did not get a reply from Mr. Belmont to your request as to being general manager?

A. Not a bit; no, sir.

X Q. 241. Not a bit?

A. No, sir.

X Q. 242. You just wrote the letters incidentally?

A. Yes, sir.

X Q. 243. And it did not disturb you at all that you did not get any reply?

A. No, sir.

X Q. 244. At the time you wrote Mr. Belmont had you decided

to resign from the canal because you could not have your own way?

A. Yes,—yes, sir.

X Q. 245. And at the time you wrote the letter to Commodore Miller about an increase of salary you had decided to resign in any event?

A. Yes, I had.

X Q. 246. Well, then, please tell us——

A. I wrote the letter, and then the next day I thought it over, and I said: "I guess I will resign." So a few days after that I wrote my letter of resignation.

X Q. 247. Had you seen him in the meanwhile?

A. I saw him shortly after that, and he thought I didn't act right in asking him for an increase of salary.

X Q. 248. When did you come to Boston on this case?

A. When?

X Q. 249. Yes.

A. On this case?

X Q. 250. Yes.

A. I came to Boston Monday.

X Q. 251. And whom did you see when you got here?

A. I saw Mr. Scott.

X Q. 252. Did you come with him from New York?

A. Mr. Scott?

X Q. 253. Yes.

A. No, sir; I was sent here——

X Q. 254. Where was Mr. Scott when you got here and saw him?

A. I saw Mr. Scott, I think,—I came Monday,—I saw Mr. Scott, I think, Wednesday the first time.

417 X Q. 255. Where did you see him?

A. I saw him up to the hotel; I was up there upstairs in a room; the telephone rang; I went down and Mr. Scott and Mr. Park was down in the lobby.

X Q. 256. And you saw them then?

A. Yes, sir.

X Q. 257. And did you talk about the case?

A. Yes, sir.

X Q. 258. What?

A. Yes, sir; I talked about the case.

X Q. 259. And you have been with them ever since, have you not?

A. I have not been with them, not particularly—I have been off and on.

X Q. 260. Off and on?

A. Yes—I have been to the theatre with them——

X Q. 261. Did you talk with Mr. Blodgett about the case?

A. Yes, sir.

X Q. 262. When did you first talk with him about the case?

A. Monday.

X Q. 263. Had you ever talked with either of the gentlemen before Monday about the case?

A. Yes; I had talked with Mr. Park and Mr. Scott in New York.
X Q. 264. When?

A. On a—let us see—Friday—Friday afternoon—last Friday, if I recollect right, at 4.30—something like that, in the afternoon.

X Q. 265. Had you ever talked with any of them before that about the case?

A. I don't think I had.

X Q. 266. Well, are you sure about that?

A. No, I don't think I had. I met Mr. Scott one time on the street and stopped and talked a little while.

X Q. 267. When was that?

A. I couldn't remember, it is so long ago.

X Q. 268. How long ago was it?

A. I couldn't say.

X Q. 269. It was quite a while ago?

A. Quite a while ago.

X Q. 270. You are very intimate with Mr. Scott, yourself?

A. He is a very dear friend of mine.

X Q. 271. He is a very intimate friend of yours?

A. Yes, sir.

X Q. 272. And has been for a good many years?

A. Yes, sir.

X Q. 273. Do you see a good deal of him?

A. No, sir, I don't see a great deal of him.

418 X Q. 274. Around 1916 and 1917, how often do you suppose you saw him?

A. I saw him about twice, I guess.

X Q. 275. Where were you then—in New York?

A. 1916—I was at the canal.

X Q. 276. I mean after you left the canal.

A. I never saw him probably—I don't think I saw him but two or three times; I very seldom saw him; I am never at home when he is, so I very seldom see him.

X Q. 277. Now I show you a letter of January 13, 1917, signed by you, to Commodore Miller, in which you ask him to cancel some letter that you had written him. Can you tell me what letter you were referring to?

A. In that I had reference to the thousand dollar raise in my salary.

X Q. 278. And that was the letter you say you wrote him, and does that refresh your recollection as to whether you discussed the Bay Port in it?

A. I don't know; I don't remember about the Bay Port.

X Q. 279. Did you keep any copy of that letter when you sent it?

A. I don't remember whether I did or not.

X Q. 280. Did you keep copies of your letters that you wrote to the Canal Company?

A. Business letters we always kept copies of; yes, sir.

X Q. 281. You always kept copies of them?

A. Yes; that is, the clerk did.

X Q. 282. Where are those copies now?

A. I couldn't tell you.

X Q. 283. Well, did you keep copies of your personal letters, or did you keep a copy of this letter asking for an increase?

A. No, I don't think I did.

X Q. 284. Do you say you did not?

A. I couldn't say whether I did or not.

X Q. 285. Now let me ask you once more——

A. Almost all personal letters I had a copy of—almost all the letters that I wrote.

X Q. 286. I want to ask you once more, Captain Geer, to be sure, as to the system in your office as to keeping files in the matters that were going on in your office. Is it not a fact that you had the files for each matter which was a duplicate of the file that was kept in the New York office?

A. I couldn't say, sir, about that; the clerk took care of that.

X Q. 287. You don't know?

A. I don't know. The clerk looked after all that.

X Q. 288. I am asking you whether there was any file that you ever saw in this Bay Port matter?

A. I saw a few statements that the pilots made; that is all I saw.

X Q. 289. You know what a file is, don't you?

A. No, sir, I do not; I am not a clerical man; I am just a practical steamboat man.

X Q. 290. Did you see any collection of papers which was marked in any way indicating that they were in the Bay Port accident matter?

A. I never saw the statements after they were made. Where the clerk put them, I don't know.

X Q. 291. You never saw the file again?

A. No, sir.

X Q. 292. You don't know whether there was any file there?

A. No, sir, I don't. I saw a few statements that the men made, and that is all I did see.

X Q. 293. Have you ever made any statements in this case yourself, other than to Mr. Park or Mr. Scott or Mr. Blodgett?

A. Any statements?

X Q. 294. Yes.

A. Why, if anybody come and asked me about it, I would tell them the truth, just the same as I am telling you today.

X Q. 295. Did you ever make any statement to Commodore Miller about it?

A. Him and I talked it over.

X Q. 296. When was that?

A. Shortly after I made a short statement,—I made a statement to Commodore Miller.

X Q. 297. Did you talk it over with him over the telephone?

A. No; I made a statement to him.

X Q. 298. Did you talk it over with him on the telephone on the 18th of December, 1916?

A. Well, I called him up.

X Q. 299. You called him up on the 18th. And will you please look at that paper, which purports to be a memorandum of that conversation, and state if that conversation took place [passing the witness a paper].

A. Well, "as manager of the Towboat Company," I said
420 that to please him, because he always liked to hear me say that—

X Q. 300. Just a moment.

A. That is correct.

X Q. 301. I am asking you whether that is the conversation?

A. That is correct.

X Q. 302. That is true, is it?

A. Yes, sir.

Mr. Pillsbury: I will offer this.

[The paper is marked as "Cape Cod Canal Company Exhibit 20."]

Mr. Pillsbury: I want to call, at this time, your Honor's attention to this one thing in it:

"Q. Did you send the tugs in your capacity as superintendent of the Canal Company or as manager of the Towboat Company?"

A. As manager of the Towboat Company."

Redirect examination.

(By Mr. Park:)

Q. 303. Captain, you have been asked about interviews by myself and Mr. Scott or others. Have counsel for the Cape Cod Canal Company had various and many interviews with you?

A. Yes, sir.

Q. 304. On board of your steamship at New York and at their office?

A. At their office at New York; yes.

Q. 305. Was their New York counsel Mr. Mahony?

A. This gentleman right there [pointing to Mr. Mahony].

Q. 306. This gentleman sitting beside Mr. Pillsbury?

A. Yes, he interviewed me, and I told him just what I have told you here in court.

Q. 307. Did he tell you he wanted you as a witness?

A. He wanted to know if I would—if he could get me if he notified me a little ahead of time. I told him I couldn't tell him; and finally I interviewed one of the other men, and they said they didn't want me.

Q. 308. Told you they didn't want you?

A. Didn't want me as a witness. J. Howland Gardner told me to come down here on this case. I told him I didn't want to come.

Q. 309. Who is Howland Gardner?

A. He is president of the New England Steamship Company.

Q. 310. You got your orders from him to come here?

A. Yes, sir.

421 Recross-examination.

(By Mr. Blodgett:)

X Q. 311. Captain, you said you talked with me last Monday about this case?

A. Yes, sir.

X Q. 312. That was the first time you ever talked with me about it?

A. That is the first time I ever talked with you about this case.

Mr. Blodgett: I suppose you agree, Mr. Pillsbury, that we notified you that we should want Captain Geer on the stand, and you told us we could see him if we wanted to, last week?

Mr. Pillsbury: You had better put in the correspondence that we had, in which you told me you should expect me to produce a long list of witnesses, and I said I did not know whether they would be produced or not, you had better summon them if you wanted to.

Mr. Blodgett: And in reference to the other witnesses, you told us that we were at liberty to see them?

Mr. Pillsbury: What took place was this——

The Court: I don't care to take time over this matter. The case is dragging interminably.

X Q. 313. You said you sent a letter of resignation, Captain Geer?

A. Yes, sir.

X Q. 314. To the Canal Company?

A. Yes, sir.

Mr. Blodgett: Have you got that letter of resignation?

Mr. Pillsbury: No, I have not.

The Witness: A few days after, I told him to cancel that letter. I had forgotten about it, but I recollect of asking him to cancel that letter.

X Q. 315. The letter of resignation?

A. No, not the letter of resignation.

Mr. Blodgett: I ask to have that letter of resignation produced.

Mr. Pillsbury: There is no such letter that we can find.

The Court: He need not produce it. Go on.

X Q. 316. The tugs you refer to as sending as manager of the Towboat Company were the tugs you sent after the first stranding?

A. Yes, sir.

422 Redirect examination.

(By Mr. Park:)

Q. 317. You have been asked in regard to the reason for your resignation——

The Court: I do not care to hear any further testimony about that.

Mr. Park: I am going to ask, with your Honor's permission, if he will give the specific reason at the time why he left the company.

The Court: How is that material here?

Mr. Park: It is to be inferred, I presume, from the cross-questions which have been put to the witness, that the reason why there was hostility on his part, or the reason why he resigned, was because he did not get a raise of salary. Now, I know the real reason he resigned. If it does not have any effect on your Honor's mind, I won't press it.

The Court: The question having been opened up, I am bound to let you go through with it, of course.

Q. 318. What was the specific reason of your resigning from the Cape Cod Canal Company at that time?

A. Well, I was hired to have full charge of that canal in taking vessels through, and my judgment was to be supreme. Well, after I had been there a few months, it was all right. Then they commenced to put on these pig ships on to me. I kept telling them they would get into trouble if they sent those ships through. Well, they says: "We have got to do it, we have got to have the money."

Q. 319. I do not mean that. I mean just at the time you resigned, what was it that occurred between you and Commodore Miller in regard to taking a steamtug to New York?

A. He called me up after the Bay Port stranded——

Q. 320. Who called you up?

A. Commodore Miller, from New York. He called me up after the Bay Port stranded and said—the Scott people were working on her then, and he said: "I want you to send a pilot down with the tugboat Stuart and get a wrecking outfit at New York." I told him we had no license for the Stuart to come to New York; and, in the first place, we had no pilots who were licensed to take her there. He said: "You take her there." I said: "I can't do it; I will get into trouble with the United States local inspectors; she has no

423 license to permit her to come to New York." At the same time she would have to have a double crew, which we did not have; and I would be the only man on her who had a license all the way through, and that would be against the laws of the United States Government, and I told him I wouldn't do it. He said: "You have got to do it." I said: "I won't do it." He said: "Mr. Belmont wants you to do it." I said: "I don't care if Mr. Belmont does want me to, you can tell him I won't do it; I will get myself into trouble and I won't do it for anybody." This was over the telephone.

Q. 321. Was that before your resignation?

A. Yes, sir; that is what started it.—one thing.

Mr. Park: That is all.

Mr. Blodgett: There is one man that has got to go to sea tomorrow morning. He will be very short.

The Court: All right.

Evidence for the White Oak Transportation Company.

J. W. MAKER (sworn).

(By Mr. Blodgett:)

Q. 1. What is your name, captain?

A. J. W. Maker, sir.

Q. 2. How old are you?

A. Fifty-eight.

Q. 3. Your occupation?

A. Master mariner.

Q. 4. How long have you been a master mariner?

A. About fifteen years.

Q. 5. Of what kind of vessels?

A. I have been in most all classes, sail and steam and towboats.

Q. 6. Sail and steam and towboats?

A. Yes.

Q. 7. Have you been in lake built vessels?

A. Yes, sir.

Q. 8. So-called "pig" vessels?

A. Yes, sir.

Q. 9. Do you know the Bay Port?

A. Yes, sir.

Q. 10. How long have you known her?

A. I have been in her about four years,—master of her two years.

Q. 11. Master of her two years. When did you leave her?

A. I left her in November before she went out from the dock here,—November 19, '17.

424 Q. 12. You are not on any vessel just at present?

A. I am in charge of the Bay View, the same class of vessel.

Q. 13. The same class of vessel?

A. Yes.

Q. 14. How long have you been in her?

A. I have been in her since last May.

Q. 15. What do you say about the draft of those vessels since you have known them on the coast?

A. Well, they ordinarily trim them about eighteen and a half aft, leaving Newport News,—about a foot drag, or a foot and a half.

Q. 16. And loaded from eighteen and a half to nineteen feet, aft, and about a foot drag, how do they handle?

A. Steer very well.

Q. 17. How do they handle in smooth water?

A. In smooth water they steer very good,—in smooth water.

Q. 18. Did you ever have any difficulty while you were on the Bay Port in steering?

A. No, sir.

Q. 19. Loaded to the depth you have stated?

A. Loaded to the depth I have stated, I had no trouble.

Q. 20. She has a round nose?

A. Yes.

Q. 21. And round stern?

A. Her stern is,—well, yes, round on top.

Q. 22. On top?

A. Yes, sir.

Q. 23. How about the bottom of the vessel?

A. She has a run like any other vessel,—like any other steamer.

Q. 24. She had a run aft like any other steamer?

A. Just the same as any other steamer.

Q. 25. What pumps did she have on board for pumping out water?

A. She had a wrecking pump, eight-inch stream.

Q. 26. Eight-inch stream?

A. Eight-inch; yes, sir.

Q. 27. And that was steam, of course?

A. Yes, that was steam.

Q. 28. And could that be used for any part of her bottom?

A. Any part of her bottom.

Q. 29. So that if water got into her forward in her bottom, you could pump it out?

A. Yes, sir; the whole length.

Q. 30. For that class of vessel, what kind of a pump was that?

A. That was a good pump.

425 Q. 31. Did you ever know of any vessel of that class or type that had an extra place to put a siphon down?

A. No, sir.

Q. 32. What cargo did Bay Port usually carry when you were on her?

A. Between 2,350 and 2,400.

Q. 33. Between 2,350 and 2,400?

A. Yes, according as the cars were coming one way or the other; 2,440 I have had in her.

Q. 34. If a vessel was trimmed 18 feet, 10, at the stern in leaving Newport News, with about a foot drag, about how much would she draw aft when she got up to the Cape Cod Canal?

A. She would come up about six inches.

Q. 35. About six inches?

A. Yes, sir.

Q. 36. From your experience, how would she steer with that trim?

A. It wouldn't make so very much difference,—very little.

Q. 37. In your judgment, would she steer properly?

A. Oh, yes, sir.

Q. 38. Have you ever been with her up any narrow channel or rivers?

A. Yes, sir.

Q. 39. Where?

A. I have been with her up the Penobscot River, to Bangor.

Q. 40. How did she steer?

A. Good. It is very narrow up there.

Q. 41. Have you ever docked her and undocked her without tug-boats?

A. Yes, always handled her without a tugboat.

Q. 42. How did she handle?

A. All right.

Cross-examination.

(By Mr. Pillsbury:)

X Q. 43. What was her construction as to ballast tanks, captain?

A. Her ballast tanks was in four sections; three sections in the hull, and a forepeak tank,—four sections in the hull, with a compartment in the forepeak on the end of that.

X Q. 44. Where were the tanks located in reference to fore and aft?

A. The whole length of the ship.

X Q. 45. Where were your fresh water tanks?

A. The fresh water tank was away aft at the engine.

X Q. 46. Away aft with the engine?

A. Yes, sir.

X Q. 47. What was the capacity of it?

A. I couldn't tell you, sir. Somewhere around fourteen
426 or fifteen thousand gallons. Just what it was, I don't know, because I have nothing to do with that. The engineer attends to the water part, you know.

X Q. 48. You know where it was located, in the extreme after part?

A. Yes, sir, I know where it was located.

X Q. 49. And you think it was of what capacity?

A. Twelve to fourteen thousand gallons.

X Q. 50. Where were your coal bunkers?

A. Forward of the fireroom,—forward of the boilers.

X Q. 51. In relation to amidships, where would that bring them? Would that be aft of amidships?

A. Away aft of amidships,—aft of amidships.

X Q. 52. What was the capacity of your coal bunkers?

A. Two hundred ton.

X Q. 53. Did you ever run on the voyage from Newport News up through the canal or the other way?

A. I have been through light, but not loaded.

X Q. 54. When did you go through?

A. I went through in the spring; I think it was in April; and then I came through in August; I think twice is all I have ever been through with her.

X Q. 55. In the year 1916?

A. 1916; yes; I think it was somewhere in the spring, April or May, I went through there; and then I came this way in August.

X Q. 56. Did you have any trouble in navigating the canal either time?

A. Oh, no.

X Q. 57. No difficulty of any sort?

A. No.

X Q. 58. Did this boat handle better loaded, or light?

A. Well, I would rather handle them loaded.

X Q. 59. So that if you went through the canal light, and had no trouble, you certainly would not expect to have any trouble loaded; is that it?

A. Well, no, not if there was water enough.

X Q. 60. Yes, assuming there is water enough.

A. Assuming there is water enough, it is all right.

X Q. 61. What effect on those boats, if any, does it have if they are down by the head?

A. Well, naturally, they wouldn't steer so good by the head.

427 X Q. 62. Why would she be further by the head when she got up to the canal from Newport News than she was when she left?

A. Burning coal and using water out of the after end of her.

Mr. Blodgett: He didn't say that. He said she would come up about 6 inches at the stern.

X Q. 63. If her stern came up, her bow would be correspondingly down, would it not,—the trim would be changed?

A. Not much.

X Q. 64. Well, it would be changed, wouldn't it?

A. Not but very little.

X Q. 65. Well, would it be changed?

A. Her bow would come down very little; it might come an inch or a couple of inches possibly, but that is all.

X Q. 66. I am not talking about the extent of it, but the trim would be changed; that is, whether little or much, there would be a different trim if the stern came up?

A. Why, certainly.

X Q. 67. And the bow would be down further?

A. That wouldn't make her draw but little more water forward than she did when she left Newport News.

X Q. 68. Perhaps very little, but the effect of lightening up the stern is to put her down at the head somewhat, whether very little or very much,—that is true, is it not?

[The witness nods.]

X Q. 69. You say the reason she would go up by the stern was the use made of the water out of the fresh water tanks and of the coal out of the bunkers?

A. Yes, sir.

X Q. 70. Did you ever have anything to do with any of these boats when they were on the lakes?

A. No, sir.

X Q. 71. Do you know about how the boats were handled there in relation to these tanks that you call your fresh water tanks?

A. I don't know anything about that,—never been up on the lakes.

X Q. 72. You don't know what these tanks were for when the boats were built?

A. I know they were built for ballast tanks.

X Q. 73. The tanks that you refer to as fresh water tanks were built for ballast tanks?

A. Yes, sir.

428 Redirect examination.

(By Mr. Blodgett:)

Q. 74. You said she would steer all right if there was water enough?

A. Yes, sir.

Q. 75. If she was drawing 18 feet, 3, aft, how much water would she require, in your judgment, to steer properly through the canal going at the speed of five knots?

A. Well, she ought to have 4 or 5 feet.

Q. 76. Underneath her?

A. Underneath her.

Q. 77. Would she steer all right if there was 25 feet of water?

A. I should say she would; yes, sir.

Q. 78. That is, 25 feet of water at mean low water?

A. Yes, I should say she would.

Q. 79. If she was down by the head, you would say she would not steer so good?

A. No, sir; not so good by the head; no, sir.

Q. 80. If she drew 18, 10, when she left Norfolk, you said she would rise about six inches aft when she got to the canal?

A. Yes, sir.

Q. 81. Would she be down by the head under those conditions, provided she had had about a foot drag when she loaded at Norfolk?

A. No, sir; she would still have 6 inches drag or 5 inches any-way.

Recross-examination.

(By Mr. Pillsbury:)

X Q. 82. These boats are never on even keel; they are not built to be on an even keel, are they?

A. It is intended she shall have a little drag.

X Q. 83. What drag is it intended she should have to have the proper trim?

A. About 18 inches.

X Q. 84. Eighteen inches?

A. Yes; that is what we allowed them down there.

Mr. Pillsbury: That is all.

Evidence for The T. A. Scott Company, Inc.

ARTHUR J. DALY (sworn).

(By Mr. Park:)

Q. 1. Your full name, captain?

A. Arthur J. Daly.

Q. 2. What is your business?

A. Foreman.

Q. 3. Were you, in 1916, wreck master for the T. A. Scott Company?

A. I can't say I was.

429 Q. 4. What were you?

A. Foreman.

Q. 5. Foreman in charge of the Salvor?

A. Foreman on the Salvor.

Q. 6. Were you at the wreck on the Salvor in the Cape Cod Canal?

A. Wreck of the Salvor?

Q. 7. Wreck of the Bay Port?

A. Yes, sir.

Q. 8. Had you done work previous to that time on the Cape Cod Canal?

A. Yes, sir.

Q. 9. On the Watuppa?

A. I was to her first,—when she first stranded. I didn't do much.

Q. 10. On the Dalzelline?

A. Yes, sir.

Q. 11. How many years experience had you had in what is called the wrecking business, salvage operations?

A. Well, 1914 I started to work for the Scott Company for a short time, and this last time I have been with them—

Q. 12. About how many years altogether, captain?

A. Twelve.

Q. 13. Twelve years. What time did you go to the scene of the wreck of the Bay Port in December, 1916?

A. The 14th.

Q. 14. You came there in tow of the Hazelton?

A. From Sandwich.

Q. 15. And the Salvor is a little wrecking vessel?

A. Yes, sir.

Q. 16. Any power of her own?

A. Only hoisting.

Q. 17. Where were you?

A. Alongside.

Q. 18. Alongside of the Bay Port?

A. On the port side, a little forward of amidships.

Q. 19. And was any steamtug in your immediate locality?

A. Yes, sir.

Q. 20. Which one?

A. The Hazelton was up alongside of the ship.

- Q. 21. Where did she go?
A. Under the bow of the ship, under our stern.
- Q. 22. And you were heading to the westward?
A. Yes, sir.
- Q. 23. And the Bay Port was heading to the eastward?
A. Yes, sir.
- Q. 24. Where was the John C. Stuart?
A. On the ship's port quarter.
- 430 Q. 25. Made fast to the ship?
A. Yes, sir.
- Q. 26. Were you there when she came off?
A. Yes, sir.
- Q. 27. Where was Captain Joseph Lewis when she came off?
A. Standing on the deck of the Salvor a little aft of amidships.
- Q. 28. Anybody else there on the deck with him?
A. Yes, sir.
- Q. 29. Who was there?
A. I was there for one, and a man by the name of Captain Brennan was there for another.
- Q. 30. Where was your engineer?
A. Engineer was in the engine room, sir,—head out of the engine room door.
- Q. 31. Any of your deck hands there?
A. One man, Hopkins, was there on deck, I believe, or coming out of the engine room.
- Q. 32. Do you know pilot Lewis, William Lewis?
A. Yes, sir.
- Q. 33. Do you know where he was when the vessel came off?
A. Yes, sir.
- Q. 34. Where was he?
A. On the bridge of the ship, the Bay Port.
- Q. 35. Are you sure about that?
A. Yes, sir.
- Q. 36. Did you see him there?
A. Yes, sir.
- Q. 37. Did you take any coal out of the forward part of the Bay Port before she came off?
A. I should judge somewhere around No. 2 or 3 hatch, sir.
- Q. 38. How much did you take out?
A. Probably three ton.
- Q. 39. And what were you doing at the time the Bay Port came off?
A. Rigging different gear for hoisting coal more quickly.
- Q. 40. And how long had you been engaged in rigging different gear from the time you had ceased getting coal out of her before she came off?
A. I should think twenty minutes or half an hour.
- Q. 41. What time did she come off?
A. I should judge it was somewhere around 10 or 10.05 or 10.10, —I don't know just exactly.
- Q. 42. Did you hear any conversation between Captain Lewis on

the Salvor and Captain Bill Lewis on the Bay Port when she came off?

A. Yes, sir.

Q. 43. State what it was.

A. Captain Lewis on the Salvor says, when she started, to pilot Lewis, "She is yours," or "You have got her," I can't say just exactly which. He waved his hand.

431 Q. 44. Who waved?

A. Pilot Lewis,—asking where to put her. "At the dolphins?" "All right, yes," was the answer.

Q. 45. At that time were you made fast to the Bay Port?

A. Yes, sir.

Q. 46. And did you disconnect those lines?

A. After Captain Lewis on the Salvor asked what to do with the salvor, and Pilot Lewis says, "Get her away from here."

Q. 47. Then you disconnected the lines?

A. Yes.

Q. 48. And the John C. Stuart came and took you in tow?

A. Yes, sir.

Q. 49. You did not see the Bay Port when she struck the second time?

A. No, sir.

Q. 50. Did you know anything about the damaged condition on the starboard side of the Bay Port before she came off?

A. I had been told there was a hole in her which had been plugged by a diver.

Q. 51. Did you know anything about her pumps gaining on the water in her hold?

A. They told me that where we was she was about dry and that she was gaining fast forward,—the pump was gaining on her all the time.

Q. 52. Did you have any conversation with any of the officers of the Bay Port as to how much coal it would be necessary to take off before she would float?

A. An officer told me it would take about two hundred tons.

Q. 53. Was that the captain, or first officer?

A. I couldn't say whether it was the first officer or not; it was an officer of the ship. It wasn't the captain.

Q. 54. You were in the process of removing that coal when she came off?

A. That is what I was there for.

Q. 55. Did you expect she would come off at the time she did?

A. I didn't give it a thought. I had just arrived there and hurried to get the coal out.

Q. 56. What was there to make lines fast to or dead men fast to on the starboard side of the ship?

A. Nothing at all, sir.

Q. 57. You have seen dead men used in that way on the shore?

A. I have.

432 Q. 58. Did you have lines on board the Salvor sufficient to make her fast upon the starboard and port side to hold her to the bank?

A. We did if we had dead men there to put them to.

Q. 59. Did you have anchors sufficient for that business?

A. We had anchors,—not on the Salvor.

Q. 60. Where were those anchors?

A. In Boston.

Q. 61. How long would it have taken to get them down there?

A. Coming from Boston to Sandwich it takes us about eight hours one way,—an hour probably of delay, which would be nine or ten hours, and three or four hours to get your anchors on board; probably take from twenty to twenty-four hours.

Q. 62. Before you could get the anchors there?

A. Yes, sir.

Q. 63. Would you have to put lines out from her port side to the north side of the canal to steady her?

A. You would to insure the safety of the ship.

Q. 64. Captain, on the morning of the 14th the hole had been plugged, and her pumps were gaining on the leak. What would be the object of dead men or anchors in holding her there?

A. I should say none to my knowledge.

Q. 65. How many boats have you worked on in salvage operations?

A. I couldn't say, sir.

Q. 66. Hundreds?

A. I dare say I have been in a hundred,—I couldn't say.

Q. 67. As many as that, you think?

A. I think so.

Q. 68. What would be the proper thing to do after the hole had been plugged and the pumps were gaining on the water?

A. To get the ship afloat.

Q. 69. Just as soon as you could?

A. Yes, sir; get her off the bank before she would be punctured again on an ebb tide.

Q. 70. Do you know anything about boulders being on her star-board side there?

A. I have heard them say they was there. I see them at the stern.

Q. 71. Do you know about that of your own knowledge?

A. I know they were on the stern,—I couldn't say on the star-board side.

Q. 72. Did you hear Captain Joseph Lewis give any orders from the deck of the Salvor after the ship floated as to how she should be navigated down through the canal?

A. No, sir.

433 Q. 73. Did he give any orders?

A. No, sir.

Q. 74. Pilot Lewis testifies that he was on the Hazelton at the time she came off, and he jumped from her to the deck of the Salvor and from there to the deck of the Bay Port.

A. Yes, sir.

Q. 75. Were you there?

A. Yes, sir.

Q. 76. You say he was on the bridge of the Bay Port?

A. On the bridge of the Bay Port.

Q. 77. Could he have got from the Salvor up to the Bay Port except by a ladder?

A. He possibly could from the Hazelton away on to the stern of the Salvor. I don't know just how close they were laying to the stern of the Salvor.

Q. 78. After she came off, what do you think about the advisability of pushing her on to the bank on her starboard side and holding her there?

A. I should think it very unwise.

Q. 79. Why?

A. Danger of puncturing the ship on a jagged boulder.

Cross-examination.

(By Mr. Pillsbury:)

X Q. 80. Will you indicate on this piece of paper how the tugs were,—can you do it?

A. I can tell you so you can indicate it; yes.

X Q. 81. I think it would be much better if you would do it yourself. I don't want you to draw any pretty picture.

A. All I can tell you, the Salvor was amidships, or forward of amidships, on the Bay Port.

X Q. 82. Where is the Salvor?

A. This is the bow of your ship, sir, and this is the bank. I should judge she was just a little forward of amidships.

X Q. 83. About here [pointing]?

A. I should say in the vicinity of here would be the Salvor, and the Stuart was here, and I presume had a line on her stern bitts leading ahead to the Salvor; his stem might project on to the starboard bow of the Salvor or not,—I can't say. These two boats were laying in this position, I think; the Hazelton and the Dalzelline were on the port bow of the ship.

X Q. 84. What order, if any, did you hear Captain Joseph 434 Lewis give to the tugboat captain of the Stuart when the ship went off?

A. I don't remember him giving any order.

X Q. 85. What did the Stuart in fact do?

A. What did the Stuart do?

X Q. 86. The tug Stuart.

A. I couldn't say. I know that he picked us up from the ship. Our lines was cast off by one of our men.

X Q. 87. Are you not mistaken about the location of the Stuart? Wasn't she alongside of the Salvor?

A. In the morning, not when the ship floated.

X Q. 88. The Stuart was here without any line to the Bay Port. was she?

A. She must have had a line on the Bay Port, or she wouldn't stay there as she did with the tide running east.

X Q. 89. Did the other two tugs have any lines on her, do you know?

A. I presume one of them did.

X Q. 90. You don't know?

A. I wouldn't swear.

X Q. 91. But you are pretty sure when she floated the Stuart was here [pointing on the diagram] and not alongside of the Salvor?

A. Yes, sir.

X Q. 92. Tell us what the Stuart did when she floated.

A. I couldn't say what the Stuart did when she floated. I know she picked us up there; I don't think the ship had gone over two or three hundred feet when the Stuart took hold of us.

X Q. 93. You were on the Salvor?

A. Yes, sir.

X Q. 94. And what she did right off was, to go to the Salvor and pick her up; she did not do anything to the Bay Port at all?

A. She was pushing the Bay Port's stern first.

X Q. 95. By whose orders?

A. I don't know whether anybody's orders or not. She worked her engines ahead, so I presume she was pushing on the stern of the Bay Port, but I couldn't say.

X Q. 96. You don't know whether she did or not?

A. No, sir; I didn't take notice; I was busy with my own lines, taking *case* of the Salvor.

Mr. Pillsbury: That is all.

435 WILLIAM A. P. BRUUN (sworn).

(By Mr. Park:)

Q. 1. What is your name?

A. William A. P. Bruun.

Q. 2. Are you a diver?

A. Yes, sir.

Q. 3. For the T. A. Scott Company?

A. Yes, sir.

Q. 4. And you have been for a good many years?

A. About six years.

Q. 5. The last three years you have been a diver employed upon the canal?

A. I was for two years.

Q. 6. For two years. What were you doing in the canal for two years?

A. Hoisting up and blasting boulders.

Q. 7. Blasting boulders?

A. Yes, sir.

Q. 8. On the bottom of the canal, or on the sides?

A. In the bottom and on the sides.

Q. 9. Are you familiar with the bottom of the canal?

A. Yes, sir.

Q. 10. You have walked pretty near its entire length under water?

A. Yes, sir.

Q. 11. On both sides?

A. Mostly on the north side.

Q. 12. Do you know where the Bay Port went ashore the first time on December 13, 1916?

A. Yes, sir.

Q. 13. Were you the diver that went down and discovered her damage and patched up the hole?

A. Yes, sir.

Q. 14. What time did you go down?

A. I think it was about five o'clock in the morning.

Q. 15. Dark?

A. Yes, sir.

Q. 16. How far from the waterline, as she then lay in the water, did you find the hole,—about how far?

A. Twelve or 14 feet.

Q. 17. Where was it, on what part of the boat?

A. It was about amidships, where the rounding of the bow came up.

Q. 18. On the turn of the bilge?

A. Yes, sir.

Q. 19. On the turn of the bilge. Do you know in what hold it was,—the break?

A. No, sir.

Q. 20. You do not know anything about the holds of the ship or different compartments?

A. No, sir.

436 Q. 21. You do not know that?

A. No, sir.

Q. 22. Will you describe that hole that you discovered?

A. That hole was a ragged hole.

Q. 23. A ragged hole?

A. Yes. It was about four inches wide, about six or seven the other way, I should think,—five or six or seven, anyway; it was big enough for me to stick my mitt in, but I couldn't turn it around.

Q. 24. You mean you could put your diving mitten in, but you couldn't turn your hand over?

A. No, sir.

Q. 25. Did you find any other damage but that upon her starboard side?

A. No, sir.

Q. 26. Did you find any boulders around there?

A. Yes, sir.

Q. 27. How far from that jagged hole which you found did you find a boulder?

A. Aft on the vessel there was one,—from the hole about five or ten feet I should say it was.

Q. 28. Right aft of the hole?

A. Aft of the hole; yes.

Q. 29. How far was that boulder from the starboard side of the ship?

A. It was very close.

Q. 30. Did you think at the time that was the boulder that had done the damage?

A. I am almost sure.

Q. 31. Did you look for any other boulders along her starboard side?

A. No, sir; but I saw another one.

Q. 32. You saw another one?

A. Forward.

Q. 33. From your examination of that canal at that place and along that bank, Mr. Bruun, will you state to the court whether there were many boulders, or few of them, there?

A. There is a pile of them.

Q. 34. A "pile of them." On the sides, I mean, now.

A. Yes.

Q. 35. Do you think you can go 100 feet on the east bank of that canal, upon the south side of it, without finding a boulder?

A. On the east bank?

Q. 36. What I call the "south side." You may call it "east."

A. On the south side,—no, I don't believe there is 100 feet there isn't a boulder in between the Sagamore bridge and Wing's Neck.

Q. 37. You don't think there is a space of 100 feet but what you can find a boulder?

A. No, sir.

437 Q. 38. That is, a boulder projecting up?

A. Yes, sir.

Q. 39. Do you know what has caused that condition?

A. The tide has got the sand away from these boulders.

Q. 40. And do the vessels, the big vessels, going through there draw the sand away, too?

A. Yes, sir.

Q. 41. You have spent two years getting boulders out, mostly on the bottom or on the sides?

A. One year, about, on the bottom, and the rest on the north bank, and very little on the south.

Q. 42. Now, did you plug up that hole that you found in the Bay Port?

A. Yes, sir.

Q. 43. And you stopped the leak?

A. Yes, sir.

Q. 44. And did you know, after you had stopped the leak, that the pumps of the Bay Port were gaining on the water?

A. I heard so.

Q. 45. You heard so? You did not know anything about that personally?

A. No, sir.

Q. 46. Did you find any other damage besides that which you have described, or not?

A. No, sir.

Q. 47. Did you measure the depth of water that was on her starboard side?

A. No, sir.

Q. 48. Where were you when she came off?

A. I was home to breakfast.

Q. 49. Home at breakfast?

A. Yes, sir.

Q. 50. Did you examine her again after she had struck the second time?

A. Yes, after she struck the second time.

Q. 51. At that time you were located in the canal,—at the time you made this examination?

A. I was working for the Canal Company through the T. A. Scott Company.

Q. 52. You were working for the Scott Company on behalf of the Cape Cod Canal Company?

A. Yes, sir.

Q. 53. You had not come from Boston?

A. No, sir.

Q. 54. Did a regular diver come from Boston, on the Salvor?

A. No, sir; I don't think so.

Mr. Park: Your witness.

Mr. Pillsbury: No questions.

438 Cross-examination. *

(By Mr. Blodgett:)

X Q. 55. You said there was a hole which you could put your hand in, but you could not turn it round?

A. I couldn't turn it around.

X Q. 56. Was there any crack running either way?

A. I couldn't say if there was, because it was dark.

X Q. 57. You couldn't see whether there was or not?

A. No, sir.

X Q. 58. Do you remember taking out some shingles from a crack?

A. Some shingles?

X Q. 59. Yes.

A. No.

X Q. 60. Or pieces of wood—and putting them in?

A. I put them in,—I stopped the hole with two wedges and some other small pieces of wood, the best I knew how, to make her tight.

X Q. 61. Was the water going in, was the suction pulling in through the hole?

A. I felt a little suction there; yes, sir.

X Q. 62. And some of your material that you were working with was sucked in?

A. Yes, sir.

X Q. 63. How large were those boulders that you saw there?

A. Well, I don't know how large they were, because there was a —they was partly covered with sand.

X Q. 64. How large was the part that you could see?

A. Oh, I should say four feet in diameter, something like that.

X Q. 65. Four feet in diameter?

A. Something like that,—a ragged rock.

Mr. Blodgett: That is all.

A. J. DAVIS (sworn).

(By Mr. Park:)

Q. 1. What is your full name, captain?

A. A. J. Davis.

Q. 2. What is your occupation?

A. Master wrecker of the King & Witherspoon Wrecking Company of New York.

Q. 3. How many years' experience have you had as what we call a wrecker?

A. About ten years.

Q. 4. Are you familiar with the Cape Cod Canal?

A. No, sir.

Q. 5. Have you been down to the Cape Cod Canal and been shown the position where the Bay Port was first ashore?

A. Yes.

439 Q. 6. Have you examined the condition of the canal at that place?

A. As far as I could, sir; yes, sir.

Q. 7. Upon how many vessels have you assisted in salvage operations in your experience?

A. I should say one hundred at least.

Q. 8. Have you been in any relation to the T. A. Scott Company at any time?

A. A few times I have been on the same wreck with them.

Q. 9. You are not one of their employees?

A. No, sir.

Q. 10. On December 13, 1916, the Bay Port, what is called a pig or whaleback, with twenty-three hundred or twenty-four hundred tons of coal, drawing 18 feet, 3, aft, went ashore on the south side of the canal, and she stove a hole, 4 by 8, on her starboard side and rapidly commenced taking in water. She went ashore about high water. Three tugs tried to pull her off and could not get her off. Captain Joseph Lewis, of Boston, representing the Scott Company, was sent there and came down immediately by train; and in the morning he put a diver on the starboard side, and he found the leak and stopped the leak. Before that time the water was gaining in the hold. After the leak was stopped, the pumps were gaining on the water. What should a skilful and careful person, engaged in trying to get her off the bank, have done under those circumstances? You have seen the spot where she was. What should be done?

A. With the tugboats that I understand he had there,—three tugboats,—the thing to do was to get the water out and stop the leak,—

get the water out of her and trust to the tugboats to take her to a better position if there was any.

Q. 11. What can you say about erecting dead men on the bank to hold her?

A. Whether I think it would be advisable to put them in to hold her?

Q. 12. Yes.

A. I don't see why they would want to hold her over a rock that had once knocked a hole in her.

Q. 13. You would try to get her off as soon as you could after the leak was stopped?

A. Yes, sir.

Q. 14. Would you have tried to get her off before you found out the extent of the damage?

A. As long as the pumps were gaining on the water I should have tried to get her off.

440 Q. 15. Supposing the pumps were not gaining?

A. Then I should have held her there until I found out whether I could gain on the water.

Q. 16. That is, until you found whether she would sink on your hands after you got her off, or not?

A. Yes, sir.

Q. 17. What do you think, after she came off, about holding her on the bank; would you have pressed her back against the bank?

A. No, sir.

Q. 18. Why not?

A. Because I would have been afraid I would put another hole in her.

Q. 19. There were three tugboats there heading to the westward and the tide was running east and the Bay Port was heading east. When she came off, what prevented those tugboats from taking full charge of her and holding her right there, if it was desired to hold her there, or taking her on through the canal if they wanted to?

A. I don't see anything, with three tugboats there, that prevented them from taking care of her.

Q. 20. Would it make any difference which way they were heading?

A. I should want them to stem the tide.

Q. 21. Why?

A. Because they could hold the ship in position better,—take care of her better.

Q. 22. Until such time as they attempted to go through?

A. Until such time as they wanted to haul her through.

Q. 23. At this time the tide was running east,—about half tide—

A. The tide was running east; yes.

Q. 24. —the ship had steam up, and she had the use of her engines. If the engines of the ship had been reversed, would that have had a tendency to hold her right there in position in the canal?

A. The tide is running east?

Q. 25. The tide was running east. If the engines of the ship had

been reversed instead of started ahead, would that have had a tendency to hold her right there in position in the canal?

A. Of course it would; yes; with the tide running east, and he backed her against the tide, it would have some tendency to hold her.

Q. 26. Supposing, on the 13th, you had gone down there as a salvor and did not know the extent of her damage, but knew that
441 she was damaged, and on account of a serious leak the water was gaining in her holds, and had learned that at pretty near high water three tugboats had tried to pull her off and could not pull her off, would you have expected, under those conditions, you would have to take out this cargo, or not?

A. Yes, sir, I should, if three tugboats were trying to pull her off at high water and could not do it before any water got into her, before she settled down any at all.

Q. 27. She had a list, as she was on the bank, of about ten to eleven degrees to port. Would that indicate to you any extraordinary liability to damage on that side of the canal; would you have been afraid of her capsizing instead of remaining steady in her position, or not?

A. Yes, sir, I should have been afraid of her turning over in the canal.

Q. 28. Had you seen any other wrecks in that canal previous to that time?

A. No, sir, and I never saw this one.

Q. 29. Where has been the scene of your work,—the Atlantic Coast?

A. The Atlantic Coast, Gulf of Mexico, Gulf of St. Lawrence and St. Lawrence River.

Mr. Park: Your witness.

[Adjourned to 10 a. m., Friday, March 22, 1918.]

Boston, Mass., March 22, 1918.

Cross-examination.

(By Mr. Pillsbury:)

X Q. 30. Captain, I understand that you have been down to the canal and looked at this place where the Bay Port struck the first time?

A. Yes, sir.

X Q. 31. But outside of that you are not particularly familiar with the canal, are you?

A. No, sir; never was through it.

X Q. 32. Have you been here during the giving of the evidence?

A. Yes, sir.

X Q. 33. And you have heard the various witnesses testify as to how the tugs were placed at the ship when she went off—

A. Yes, sir; as far as I could understand; I sat pretty well back; I probably didn't understand it all.

X Q. 34. —and what happened when she did get off and what eventually happened?

A. Yes, sir.

442 X Q. 35. Now, captain, in answering this question I want you to leave out any question of any boulders or rocks on the bank there.

A. Yes, sir.

X Q. 36. Assuming that there is no difficulty about any rocks, and assuming that there was a full supply of cables and anchors available on the morning of the day that she went off and previous to that, is there any reason that she could not have been made so fast to the bank that, in the event of her floating, she would not have got out of control?

A. Was there any way that she could be made fast?

X Q. 37. Was there any reason why she could not be?

A. Any reason why?

X Q. 38. If you had a full supply of anchors and cables and if you do not have to consider any question of rocks?

A. There was no reason why she could not have been made fast to the bank.

X Q. 39. Now, if she had been made fast, of course, if she should float when she was partly full of water and therefore hard to manage, she would have been in such control that she could have been further pumped out before attempting to navigate the canal, could she not?

A. If she had been made fast to the bank?

X Q. 40. Yes.

A. Yes, sir.

X Q. 41. Now, if a boat is firmly aground on a bank, and if the boat has been held in that position by tugs throughout an entire night and there is no change of condition in the morning with the exception that some water had been pumped out and the leak had been plugged, but there was still a good deal of water left in her, will you tell me why the tugs which had been holding her against the bank during the night successfully should not continue to do so the next morning?

Mr. Park: That is hardly a fair question, your Honor. The fact is undoubtedly that she was so heavily imbedded upon her starboard side that during high water these tugs could not pull her off.

Mr. Pillsbury: The statement of Captain Joseph Lewis which has been put in evidence says they did hold her against the bank during the night, and the tugs were pushing her.

The Court: My present notion is, that the facts do not
443 come up to your question; but, of course, the facts may change, so you may put your question. It may eventually come out.

Mr. Pillsbury: If your Honor will indicate, I would rather re-frame it.

The Court: Of course, the evidence is not closed. If you are basing the question upon the facts as they now appear, I should say

it appeared that the ship was aground and that she stayed on the bank because she was holding bottom instead of being pushed there by tugs.

Mr. Pillsbury: I quite agree. If I have phrased the question in the other form, I did not mean to. I do not mean they were holding her in the sense that if they did not hold her she would go off. I mean they were trying to hold her in the event that she should float.

X Q. 42. Captain, I did not want to give you an impression that during the night the tugs were holding her there in the sense that if they were not there she would go off at all; that is, she was aground and had a port list and was so firmly aground that the day before the tugs had not been able to pull her off, but, in that situation, during the night they had had the tugs with their noses against her, not for the purpose of holding her while she was fast aground, but apparently for the purpose of controlling her in the event she should float. Now, in that situation is there any reason why the tugs should not continue to do that the next morning as well as the night before?

A. No reason why they should not do it, sir; in case it was necessary and they wanted to hold her there, they could hold her there, of course; there is no doubt about that.

X Q. 43. Now, if a ship is fast ashore in the way that has been described this ship was, with a port list, and there is no sea of any kind, no sea running, it is in a waterway where there isn't any sea, there is no dashing of waves on the shore, or anything of that sort, it is nothing but a current; and she is in that position, resting on the bank, with a list toward the bank, and you have tugs with their noses against her for the purpose of holding her in the event she should float, you then have a situation similar to a man with his fist against his hand; and in the event of her floating it is
444 merely a steady pressure and simply holds her in the position that she is in,—that is true, is it not?

A. Yes, sir.

X Q. 44. If that is the situation, and there is no sea running, then would you expect any pressure of that sort, holding the ship in that way, to punch a hole in her?

A. Not in a place where the tide did not ebb and flow.

X Q. 45. Well, leave out the question of tide for the moment. In a place where there was no sea in the sense of washing up.

A. If he didn't shove too hard. He could shove too hard and put another hole in her, I suppose.

X Q. 46. I am assuming he did not shove too hard.

A. He could probably shove easy enough to hold her there without doing any damage.

X Q. 47. And the tide, as it runs, if it has any tendency one way or the other, has a tendency to float her off from the bank, does it not?

A. In this spot—I couldn't say about this spot, sir,—I couldn't say about this place.

X Q. 48. Well, you saw this place?

A. I went down and see the place.

X Q. 49. Assuming that the tide at that time was running to the eastward and that she was lying in the way you have heard described, along the bank, headed to the eastward, and she is allowed to float without any ropes or any tugs against her, the tide would swing her into the stream naturally, would it not?

A. Well, I couldn't say about this spot or this place. There would be places it would and places it wouldn't. Now, this place I couldn't say, in the Cape Cod Canal or in the spot she was on. There are places the tide will set a ship on the beach, and there are places that it will cut her out.

X Q. 50. You have seen this place?

A. Yes, sir.

X Q. 51. And I am assuming that the tide is running to the eastward, and you have heard the description of what did happen when the ship floated; as a matter of fact she did float into the stream when she did float?

A. She floated into the stream I understand.

X Q. 52. Would you not say that, under those conditions,
445 the tendency of the tide, running as it was, would be to float her off into the stream?

A. Why, it appears as though that was what it did do.

X Q. 53. And if it did do it, you would say that it would do it?

A. It probably would do it if it did do it, from what evidence I have heard.

X Q. 54. Suppose you were master of a ship in that condition, and you were on the ship and were in control, and she did float off in the way that you heard described here; and at the time she floated she had so much water in her that it was over the coal in the forward part of the boat; that is, she had been making water from a little hole that was in her, and they had pumped out a part of it, but there was so much left that it was over the coal in the forward part of the boat, and, as a result, when she floated off she was very much down at the head and logy from the water; what steps would you have taken at the time she floated off to insure her safety?

A. I would have trusted to the local knowledge of the pilots and tugboats that were there to help me to put me in a more suitable place to get the water out so she would be in seaworthy condition.

X Q. 55. That is, the first thing you would have done would have been to get her into some position in order to get the rest of this water out?

A. Yes, sir.

X Q. 56. That was the first thing to do, was it not?

A. Yes, sir.

X Q. 57. Was there any reason why the boat could not have been held in the deep water where she floated off a sufficient time to pump this water out before an attempt was made to navigate the canal with her?

A. No reason that I can see in the world why she could not have been held there with three tugs.

X Q. 58. Provided the tugs were in proper condition?

A. Proper condition and position.

X Q. 59. And in proper position at the time she went off?

A. Yes, sir.

X Q. 60. Now, will you be good enough to indicate—you do not object to drawing a little bit, do you, captain?

A. I don't understand how to draw, but I will make an attempt.

446 X Q. 61. I am sure you understand it better than I do.

A. I will make an attempt. What is it you want me to do?

X Q. 62. Just give us a little sketch and indicate the boat lying along the bank, and indicate the position of the tugs which you think they should have occupied in order to be available to hold her in the deep water in the way you have described, if necessary.

A. You claim this canal runs east and west?

X Q. 63. Yes, and the boat was heading east, and the current was running east.

A. And the tide was how, sir?

X Q. 64. The state of the tide do you mean?

A. No, sir, not the stage, but which way was the current setting, to the eastward or westward?

X Q. 65. The current was setting to the east.

A. [Making a sketch on a sheet of paper.] With the current setting east—

X Q. 66. Let us see. This is the east and this is the west, and you have got your current east. Now, will you draw your boat and indicate, after you have done that, the position of the tugs?

A. We will call this the boat, then.

X Q. 67. This is the boat right here?

A. This is the boat, and the current is setting east.

X Q. 68. Yes, and the boat is facing east.

A. And the boat is facing east. In the case of this boat coming off, I would think that I would have wanted a tugboat at the stern of this ship, stemming the tide, of course; the current is setting east, that would be coming from the west,—to hold her in the position as she came off the bank until I could have got other tugs to have handled her in the proper place,—put her in the proper place.

X Q. 69. This is the boat, and this is the current. Now, you have just indicated you would want one tug at the stern?

A. At the stern. With the tide setting that way, the tide going that way, I would probably have put a tug off to a line,—have a tug there to hold the ship out off the bank and hold her in position until I could have placed other tugs in suitable position,—had one tug as an anchor, you might say, to hold her out in the stream.

X Q. 70. Would you have had that tug with a line to the ship?

447 A. Yes, of course, I would have had to; if I didn't, she wouldn't have held the ship.

X Q. 71. You would have had a tug there and you would have had a line from the tug to the ship?

A. Sure; yes.

X Q. 72. Where would you have had the other two tugs?

A. If I had wanted the best, and if the captains and the men in charge said that they could handle the ship, I would have put them in the most suitable position, which would have been probably aft of amidships on the ship, where they usually tie up tugs in handling a ship.

X Q. 73. Would you have had lines from those tugs to the ship?

A. I would have had lines from the tugs to the ship.

X Q. 74. Suppose that you had a lighter alongside about amidships and a tug that we will call the Stuart—

The Court: Before we leave that, there was some evidence, was there not, that the Stuart offered a line to the steamer, and the steamer refused it?

Mr. Park: Yes.

The Court: That was the Hazleton? The Stuart took the lighter?

Mr. Pillsbury: Yes, the Stuart took the lighter.

The Court: And the Hazleton swung around and offered a line, which was not accepted?

Mr. Pillsbury: Yes, and the Dalzelline did get a line on the bow and went ahead.

The Court: Yes, have got it now. Go on, Mr. Pillsbury. I wanted to clear that up.

X Q. 75. Now, suppose the most powerful tug that you had was named the Stuart and that there was a lighter alongside the boat, and the Stuart was tied up to the lighter on the other side; would you have considered that a proper arrangement of that tug for this situation?

A. If a tug had been tied up alongside of the lighter, and the lighter alongside of the ship?

X Q. 76. Yes.

A. Not to hold the ship; no, sir.

Redirect examination.

(By Mr. Park:)

Q. 77. How long, captain, would it have taken the John C. Stuart, accepting as a fact that there is diversity of testimony as to
448 her relation to the Salvor, to have got away from the Salvor and got on the port quarter of that ship, the John C. Stuart all the while being headed to the westward against the tide and made fast?

A. She was headed to the westward against the tide?

Q. 78. Yes.

A. And the ship was headed to the eastward?

Q. 79. Yes. How long would it have taken her to have gone from amidships of that ship on to her port quarter and got a line, assuming she was tied up to the Salvor?

A. Twenty minutes.

Q. 80. Twenty minutes?

A. Yes.

Q. 81. Have you ever been a tugboat man?

A. I have handled some tugboats.

Q. 82. Have you been master of any?

A. No, sir, I have not been master of tugboats.

Mr. Park: That is all, captain.

ISRAEL MERRITT TOOKER (SWORN).

(By Mr. Park:)

Q. 1. Your full name, captain?

A. Israel Merritt Tooker.

Q. 2. What is your business, your occupation?

A. Salvage business, all kinds of submarine work.

Q. 3. How long have you been engaged in salvage operations?

A. Thirty-five years.

Q. 4. And you are superintendent of the Merritt & Chapman Wrecking Company?

A. For the past 28 years.

Q. 5. That is the largest concern in the world dealing in salvage operations probably?

A. That I know of.

Q. 6. You have had large experience all over the world?

A. All kinds, all over the American continent.

Q. 7. Captain, when did you go down to the Cape Cod Canal, and were you shown the place where the Bay Port was first ashore in the canal?

A. No.

Q. 8. Were you down there at all?

A. I went down there.

Q. 9. When did you go down there?

A. I think on the twenty-fourth day of December, 1916; I am not positive.

449 Q. 10. The 24th. Well, was the Bay Port sunk at that time?

A. Yes, sir.

Q. 11. Sunk down towards the east end of the canal?

A. Yes, near Sagamore.

Q. 12. Captain, did you know Captain Joseph Lewis?

A. Yes.

Q. 13. How long had you known him?

A. About 18 years.

Q. 14. What can you say as to his ability and as to his skill in handling salvage operations and in relieving vessels that are in distress?

A. I always considered it first-class.

Q. 15. On the 13th of December, 1916, the whaleback Bay Port laden with coal went ashore on the south side of the canal, starboard side, resting up on rip-rap of the canal. She was lying parallel with

the bank. She went on at about high water. Very shortly after high water, three steamtugs tried to pull her off and were unable to pull her off. She commenced to leak,—the water gaining in her forward compartment. On the following morning, early, a diver went down, found a leak four by eight. He plugged the leak, and thereupon the steamer's pumps commenced to gain upon the water. Now, from your knowledge of operations in relieving vessels in distress that are stranded, what should be done under the circumstances in order to have released the Bay Port from her stranded position?

A. Was this leak four feet by eight feet, or four inches by eight inches?

Q. 16. Four inches by eight inches.

A. A very small affair?

Q. 17. Yes. That was plugged up. What should have been done to release her from the bank?

A. Pump her out and lighten her.

Q. 18. You mean, take out coal out of her?

A. Yes, sir.

Q. 19. Would you have thought, captain, if three tugs were unable to haul her off at about high water, that the next day she would come off without removing any of her cargo, or not?

A. Well, I have no experience on a wreck in the canal. Naturally, I wouldn't think so.

Q. 20. Had you had anything to do with relieving vessels in the canal, yourself personally, that had been ashore?

A. No, not in Cape Cod Canal.

Q. 21. Well, captain, do you know of any place in the Cape
450 Cod Canal where you can make a vessel fast to the shore, from what you have seen of it? What would you have to do to make a vessel fast to the shore?

A. Use anchors.

Q. 22. Well, how big anchors? Taking a vessel 265 feet long, drawing 18 feet, 3 inches, aft, loaded with 2,400 tons of coal, and ashore, her starboard side up on the sloping bank, what size of anchors, how many, would be required to keep her there?

A. She would require at least four.

Q. 23. She would require what?

A. She would require at least four anchors.

Q. 24. What size?

A. Five ton,—from four to five ton.

Q. 25. From four to five-ton anchors?

A. Yes, sir.

Q. 26. How far away would you have to move them from the ship to make them fast?

A. Three hundred feet.

Q. 27. What kind of chains would you have to have?

A. Wire.

Q. 28. Wire chains. And if there were none at the canal that answered that description, where could you have got them?

A. Got them from New York, New London, New Bedford or Boston.

Q. 29. You would have to go there and get them?

A. I don't think you could get them at New Bedford.

Q. 30. You don't think so?

A. No. New York, New London or Boston.

Q. 31. Captain, if on the morning of the 14th of December, after the hole in her starboard bottom had been plugged, her own pumps were gaining on the water, would you at that time have considered it prudent or not to have made arrangements to have got anchors out there in order to hold her on the bank?

A. I wouldn't have had time.

Q. 32. Well, would you have gone right on and got her cargo out, or not, as quick as you could?

A. Proceeded with the cargo after the other work was done.

Q. 33. Proceeded with the cargo?

A. Yes.

Cross-examination.

(By Mr. Pillsbury:)

X Q. 34. Assuming the salvor, the wrecking concern, had been and viewed the wreck and had sent to Boston and had obtained a full supply of anchors and cables and had this full supply available on the morning of the 14th, would you have considered it prudent for the concern to have made some attempt to use those anchors and cables to make her fast, in the event of an unexpected floating, before you proceeded to further pump out the water or otherwise lighten her for the purpose of floating her?

A. They would not have had time to place those anchors in a proper position before the next high water.

X Q. 35. Assuming you have got your anchors and cables available, how long would it take to place them?

A. It would take at least one day of 24 hours, providing the anchors and everything to use were on the lighter's deck.

X Q. 36. I am assuming they were available. How would you place your anchors?

A. I would put two across the canal to the north bank, one at the bow of the ship and one at the stern; that is, the lines leading to the—the mooring lines leading to the anchors, one at the bow and one at the stern. The other two I would have placed in a similar position on the other side of the ship,—south bank, only up on the bank. That would have required some time to get them up there properly. They would have to be buried largely.

X Q. 37. So that two of the anchors you speak of would not be placed on the bank, but would be in the canal?

A. Well, they would have been placed half way up the bank of the canal.

X Q. 38. I am speaking of the two——

A. Yes, part way up the bank.

X Q. 39. Well, there would not be any hole dug for them or anything of that sort; they would be put on the bottom?

A. Temporarily.

X Q. 40. Yes. So that you would only have two anchors that you would utilize on the south bank. Now, what would you do with those two anchors on the south bank?

A. Place them on top of the bank to get an inward lead for the lines.

X Q. 41. How could you have secured the anchors to the bank?

A. Dug a hole.

X Q. 42. What?

A. Dug a hole probably.

X Q. 43. Dug a hole and buried them. Now, do you—
452 A. I don't say—one moment—I don't say that I would have placed these four or five-ton anchors on the south side. I might not have been able to get them up there. But I would have used a substitute.

X Q. 44. What size anchors would you have used on the south side.

A. Used a substitute equal to the holding powers of a four-ton anchor.

X Q. 45. Suppose you were fully supplied with anchors which had been obtained after you had seen this situation, and which had been obtained for the purpose of using them in this work, what would you have done so far as the south side is concerned?

A. After I had seen the situation?

X Q. 46. Yes, after you had seen the situation and got a full supply of cables and anchors?

A. I would not have had time to get a full supply there after I had viewed the situation.

X Q. 47. Captain, you work a little slower than the other wrecking companies, do you not?

A. I don't see why.

X Q. 48. It appears in evidence that this company here had a full supply—

Mr. Park: I object to that. There is no such testimony.

Mr. Pillsbury: Captain Joseph Lewis said so in his statement to you that he made in the ordinary course of business.

Mr. Park: No, nothing of the kind,—no such anchors as you refer to. He had anchors, etc., but no such anchors as that. It does not state their weight.

Mr. Pillsbury: He said he had a full supply of anchors and chains.

The Court: What you are thinking of is the answer to one of the interrogatories, where they say the Salvor left, fully supplied with a full equipment, or something like that.

Mr. Pillsbury: Well, I think it does appear in the interrogatories as well, but it appears in this statement which I put in yesterday but did not read, of Captain Joseph Lewis, as follows: "Ordered our wrecking lighter Salvor to get away from Boston as soon as possible, fully equipped for the service with pumps * * * anchors and cable, * * * and with a crew of divers, tenders,

453 pump engineers, firemen, wreckers, laborers," etc. And it appears in evidence that the Salvor did arrive on the morning of the 14th and was there,—she arrived early on the morning of the 14th.

X Q. 49. Now, will you tell me again what you would have done so far as the anchors on the south bank are concerned?

A. I would not have done anything about anchors if I had been on the job,—wouldn't have used any anchors.

X Q. 50. Wouldn't have used any at all?

A. No.

X Q. 51. Either on the south or the north?

A. No.

X Q. 52. Well, then, captain, have we got to start all over again? I thought you told us in your direct examination that you would have used four anchors, and you would have placed two halfway up the north bank, and you would have placed the other two on the south side?

A. That was on the assumption if I had had time to place them.

X Q. 53. I am not going into the question of time at present; I am assuming that you have got your anchors there, you know that they are all available. You would not have used them on the south, would you?

A. Not that day.

X Q. 54. What day would you have used them on the south?

A. I would use them the next day if the vessel hadn't come off that day.

X Q. 55. Why was it better to use them the next day than the day in question?

A. I wouldn't have had time.

X Q. 56. Wouldn't you have started to do something with them on the day of the 14th?

A. Possibly after high water and if the vessel didn't come off.

X Q. 57. If she had gone on at high water and three tugs had not been able to pull her off, wouldn't you assume that unless you pumped the water out and lightered the cargo, she would stay there in that position?

A. I would consider the erosion in the canal.

X Q. 58. What is this erosion that you speak of?

A. Cutting of the bottom out from under the vessel.

X Q. 59. Was that something to be expected?

A. It was not unexpected.

454 X Q. 60. So that in that situation erosion was likely to occur which would have affected the floating of the vessel?

A. It is possible.

X Q. 61. How long would you say it would require that erosion to take place if you did not lighten the ship up by pumping water or lightering the cargo,—how long do you think it would take that erosion to float her?

A. That is an engineering question which I could not answer without going there and making an examination with instruments.

X Q. 62. Well, would you, captain, refrain from starting in to place your anchors and make the boat secure, on account of the fact that erosion existed,—would that affect your action one way or the other?

A. No, not if I had sufficient tugboats there to hold the vessel if she came off unexpectedly.

X Q. 63. That is, this erosion matter would not be considered by you in connection with what you would do to fasten her to the bank, would it?

A. No.

X Q. 64. Well, let us get back. What would you have done with your anchors on the south bank if you were going to attempt to fasten her?

A. If the vessel had not floated that day?

X Q. 65. Yes,—well, I will put it that way if you like,—if she had not floated that day.

A. Please repeat that question.

X Q. 66. I said, what would you do with your anchors on the south bank?

A. I would have placed them in the proper position.

X Q. 67. What would be the proper position?

A. I described it before. One at the bow, one at the stern, leading inland.

X Q. 68. And how would they be secured,—by burying them. I understand?

A. Probably would have had to use what they call "dead men," a log buried at right angles to the mooring line between the log and the vessel, covered with sand or dirt.

X Q. 69. Supposing you had your cables and anchors or dead men available, how long would it take to bury them on the south bank in the way that you have just described?

A. At least 24 hours.

The court: He has testified to that before.

X Q. 70. Do you really mean that, captain,—that it would take 24 hours to dig a hole for either two dead men or two anchors, and attach a cable to the ship and the bank,—that it would
455 take 24 hours to do the work,—is that what you mean?

A. Well, generally there is always some one knows more about our work than we do,—think they can do it a little faster.

X Q. 71. Yes; but I want to be sure that you mean that. You are not allowing any time for getting these anchors?

A. I am allowing 24 hours' actual continuous work.

X Q. 72. To bury the two anchors or dead men and attach the cables?

A. And attach the anchors properly on both sides of the canal, which are necessary, in proper manner to hold her there until I finished her completely so she could be taken from that place right through to Boston.

X Q. 73. Well, now, I was not asking you that question, captain,

at all. In the first place, I was not asking you about any work done on the north side. I was limiting my question to the south side; and I was not asking you on the question of how long it would take to put her in proper shape to take her to Boston. All I was asking you was, how long it would take to place the two anchors on the south bank.

A. I didn't say "proper shape to take her to Boston." I said to hold her in proper shape,—to hold her until she was in proper shape.

X Q. 74. All right, we will accept that amendment. Will you just tell me how long it would take to do the work of placing the anchors on the south bank and attaching cables to the ship?

A. Probably 15 hours.

Redirect examination.

(By Mr. Park:)

Q. 75. If you had gone down there in the place of Captain Lewis to relieve that ship from her stranded position, what would have been your object,—to make her secure to the bank or to get her off that bank as soon as you could?

A. I would get her off the bank as soon as I could, and depend on the pilot to take charge.

Q. 76. And assuming there were three tugboats right there alongside of her all the time—

A. Yes, an ideal position to handle her.

Q. 77. —you would simply have got her off as soon as you could, in the best way you could?

A. Yes, sir.

456 Q. 78. Have you been here and listened to the testimony of how she came off?

A. Yes, sir.

Q. 79. Can you suggest any better way to take that vessel than has been shown and proved here to have been used by Captain Joseph Lewis, or not?

A. There was no other way.

Q. 80. Was it done speedily and skilfully, or not, in your judgment?

A. Done in the only manner it could have been done.

Recross-examination.

(By Mr. Pillsbury:)

X Q. 81. If I understand you, you say that to get the vessel off in the way that this one was got off, half full of water, in a current, was the best possible way to do it?

Mr. Park: I object. Nobody has claimed that this vessel was half full of water.

X Q. 82. Then I won't say "half full of water," but with water so high in the forepart of it that it was over the coal, and the vessel was well down at the head.

A. How many feet of water would that be in the vessel?

X Q. 83. Well, you know these whalebacks better than the rest of us, and you have heard how she was loaded, and the water was over the coal.

A. Well, 'then the vessel would never have floated; she would have sunk.

X Q. 84. What?

A. The vessel would have sunk, wouldn't have floated, with the water over the coal,—so I can't answer.

X Q. 85. She wouldn't have floated in that condition?

A. No, sir.

X Q. 86. Well, Captain Joe Lewis says that was her condition, and she did float. Now, will that change your opinion?

A. That wouldn't change my opinion.

Mr. Pillsbury: That is all.

Mr. Park: That is all.

457 LYMAN J. ROBBINS (sworn).

(By Mr. Park:)

Q. 1. What is your name?

A. Lyman J. Robbins.

Q. 2. You are a licensed pilot, Atlantic Coast and waters?

A. Yes, sir.

Q. 3. How long have you had maritime experience on vessels?

A. Since 1889,—September.

Q. 4. Have you been through the canal?

A. Yes.

Q. 5. Do you know the canal?

A. Yes, sir.

Q. 6. How long have you been familiar with the canal?

A. Ever since before it was built.

Q. 7. What steamtug are you connected with now?

A. Tug Neptune.

Q. 8. A Boston boat?

A. Boston Towboat Company.

Q. 9. Running where?

A. Running between Boston and Portland and Eastern ports and New York.

Q. 10. Do you know Captain Joseph Lewis?

A. Yes, sir.

Q. 11. How long have you known him?

A. I have known him for a number of years; I don't know just how long.

Q. 12. Have you worked with him in salvage operations upon different vessels?

A. Yes, sir.

Q. 13. Many, or few?

A. Considerable many.

Q. 14. And what can you saw as to Captain Lewis' skill, as far as you have observed while working with him in salvage operations?

A. I should say it was first-class in every respect.

Q. 15. Did he bear that reputation among maritime men as far as you know?

A. I believe he did. I have never — him spoken of otherwise.

Q. 16. Captain, you know the Bay Port?

A. Yes, sir.

Q. 17. On the 13th of December, 1916, she was on the south bank of the canal, about half way through the canal, laden with coal, and she went on practically at high water; and shortly thereafter an attempt was made by three tugs, the Stuart, the Hazelton and the Dalzelline, to pull her off, without success. On the following morning, all the tugs being there and the tugs being alongside but heading to the current, to the westward,—the current running eastward—the hole was plugged and they were gaining upon the water in the hold of the Bay Port by the ship's own pumps, when she came off. I want to ask you, under those circumstances, what difficulty there was, if any, in those three tugs keeping that vessel right there if they had wanted to?

A. You mean, as far as she floated,—to keep her in the canal?

Q. 18. Yes.

A. There was no difficulty.

Q. 19. Any trouble in doing it?

A. No trouble, any more than just manœuvering the boats, that is all.

Q. 20. There was steam on the Bay Port. Could she have reversed her engines if necessary?

A. She could have; yes, sir.

Q. 21. Now, it is charged as a fault against the Scott Company that the tugs, heading the current, were heading the wrong way if they had wanted to hold the Bay Port there. How should those tugs, in your judgment, have headed?

A. Head to the current, head to the westward.

Mr. Park: Head to the westward. That is all.

Mr. Pillsbury: That is all, captain.

Cross-examination.

(By Mr. Blodgett:)

X Q. 22. You have had a good deal of experience in this canal, haven't you?

A. Considerable; yes, sir.

X Q. 23. Did you, while you were operating there, ever notice this knuckle on the north bank that has been spoken of here?

A. You speak of it as "knuckle"? Yes, I guess I understand what you mean.

X Q. 24. And in navigating by there did you, in your experience, notice any current or eddy that set over toward the south bank?

A. Yes, when the tide is running. On either one or the other slack water you wouldn't notice it.

X Q. 25. When the tide is a head tide, and you are going to the eastward, what effect would that current have on a vessel?

A. Well, if there was a current running, it would have the effect of striking off from that knuckle and striking the bluff of the vessel's bow and making her sheer.

X Q. 26. Over towards the starboard?

A. Yes, sir.

459 X Q. 27. How long had you noticed that?

A. That knuckle there?

X Q. 28. Yes.

A. Well, I have noticed it there ever since it has been there,—ever since the canal was finished, sir.

X Q. 29. Was that north bank ever finished where that knuckle is?

A. Finished?

X Q. 30. Yes.

A. I don't think, myself, that any part of the canal has ever been finished.

X Q. 31. Well, where that knuckle was, was it different from the bank further on, further to the eastward and further to the westward?

A. In shape it was different,—projected out from the side.

X Q. 32. Projected out into the canal?

A. Yes, from the side of the canal.

X Q. 33. And that had always been there from the time the canal was constructed?

A. I think so; I am quite positive.

(By Mr. Pillsbury:)

X Q. 34. Do you know whether it projected under water at all?

A. I couldn't say sure, under water; no, sir. I know above the surface of the water it does.

X Q. 35. And if it was only on the surface, it would not have any serious effect on the current, would it?

A. Well, yes, I think it would on the surface of the water.

X Q. 36. That is, it would be confined to a surface eddy, would it not; it would not have any effect on the deep current in the channel?

A. Well, I don't know about that, sir; I couldn't tell you; I am not familiar enough with it to tell you whether it would or not.

X Q. 37. You never had any accident there, did you?

A. In that one particular spot?

X Q. 38. Yes.

A. No, sir; I always guarded against it especially.

(By Mr. Blodgett:)

X Q. 39. You say you do not know whether it extended below water?

A. I don't know for a certainty; no, sir——

X Q. 40. You don't know for a certainty?

A. —but I imagine it does.

460 Mr. Pillsbury: What extended below water?

Mr. Blodgett: The knuckle.

Mr. Pillsbury: I think his imagination ought to go out. He says he doesn't know whether it did or not.

The Witness: The reason why I don't know is because I have never been down there to look; that is the only reason.

The Court: What he means is, that it acts as if it did, I suppose.

X Q. 41. You do know whether it extends below water, do you not; you have experienced it and have known of a current there which set your vessel over to the starboard bank?

A. In going through there, before we get to that place, we always forelay for a little extra judgment, and have everything all ready.

X Q. 42. And you have always noticed that sheer to the south bank, going there on the head tide?

A. Yes, sir.

(By Mr. Pillsbury:)

X Q. 43. That is true of a great many places in the canal?

A. Yes; there are many places similar to that.

X Q. 44. Of course this canal has a good deal of current, and it is not straight, and there are some places where it is harder to steer than others, are there not?

A. That is very true; yes.

X Q. 45. And, of course, the pilots know those places and they exercise more care at those spots than they do where the steering is easy?

A. Presumably they would; yes, sir.

BENJAMIN KEMP (sworn).

(By Mr. Park:)

Q. 1. Your name is Benjamin Kemp?

A. Yes, sir.

Q. 2. You are a licensed pilot?

A. Yes sir.

Q. 3. And have been how long?

A. Eleven years.

Q. 4. Are you a master now? What is your present occupation?

A. Master of tugs and yacht pilot, Boston Navy Yard.

Q. 5. You are a brother of Captain Joseph Kemp who has testified in this case?

A. Yes, sir.

Q. 6. Captain, are you familiar with Cape Cod Canal?

A. Yes, sir.

461 Q. 7. You have been master of vessels going through there?

A. Yes, sir.

Q. 8. Do you know its currents and its conditions?

A. Yes, sir.

Q. 9. Do you know the Bay Port?

A. Yes, sir.

Q. 10. Do you know the tugs John C. Stuart, Dalzelline and Hazleton?

A. Yes, sir.

Q. 11. On the 14th of December, 1916, the Bay Port, laden with coal, which had been stranded upon the right-hand side of the channel coming towards Boston, after a leak had been stopped in her bottom and her pumps had pumped out some of the water, floated. The tide was running east, the tugs were alongside on her port side heading the tide. What would have prevented, if anything, if there had been any desire upon the part of those in charge of the Bay Port to have her held there in the canal at that place,—what would have prevented those tugs from holding her right where she was?

A. I see no difficulty in holding her.

Q. 12. The Bay Port had steam on in her boilers and her engines were ready for use if necessary.

A. If necessary; yes, sir.

Q. 13. Would the reversed action of the Bay Port's engine, if ordered, have helped keep her there?

A. If the vessel had taken sheers to warrant it, and with a right-handed wheel such as that ship had,—in backing it would go to port; and, if so desired, you could reverse the engine according to the way the ship handled.

Q. 14. Do you know of anything which would have prevented the three tugs coming on her port side when she came off and managing that vessel and keeping her right there in the canal or letting her drift if they had wanted to?

A. None whatever.

Cross-examination.

(By Mr. Pillsbury:)

X Q. 15. If you had been master of the ship when she went off in the condition that you have heard described, with water in her, that is what you would have done, is it not; you would have tried to hold her there in deep water and not have continued the navigation of the canal?

A. As master of the vessel?

X Q. 16. Yes.

A. I should have consulted the pilot.

X Q. 17. Well, suppose you had not taken any pilot; suppose you

462 were charged with the responsibility; or suppose, having a pilot, this was such an emergency that you would be supposed to exercise your judgment, what would you have done,—would you have kept her right there?

A. As being master of the vessel?

X Q. 18. Yes.

A. With a canal license or without one?

X Q. 18a. Well, without one.

A. Without one?

X Q. 19. Yes.

A. I wouldn't have been in there, sir.

X Q. 20. You wouldn't have been in where?

A. In the Cape Cod Canal.

X Q. 21. I am speaking now, not about a license, but about what would be the safest thing to do for the ship.

A. As being master of the ship?

X Q. 22. Yes.

A. With no pilot?

X Q. 23. We will leave out the pilot, if you like; yes. What would be best for the ship when she came off in the way described? Was the best thing for the ship to be held in the deep water until the pumps had got out the rest of the water before the journey was resumed, or would you say it was better to attempt to go to the eastward with the tide?

A. As being master of the ship, in the canal?

X Q. 24. Yes.

A. In regards to the proceeding, I should have seen the stability of the ship, whether she was by the head, on an even keel or by the stern. If the tide had been running so fast that we thought we couldn't steer her,—if she had been so that you could proceed in the usual way, you could proceed through the canal,—I should have dropped her down to the next dolphins, which was a matter of eight or nine hundred feet, and waited until the tide slackened up, if the tide was running so fast at that time. If I had found the ship was manageable, I should place the tugboats and proceed through the canal.

The Court: Were the dolphins between the place where she came off and the place where she finally was at rest?

Mr. Pillsbury: I so understand.

The Witness: Yes, sir; on the north bank.

X Q. 25. About how far down?

A. I should say from the testimony I have heard, from where she struck a matter of—oh, perhaps a thousand feet, perhaps a little more.

463 (By Mr. Blodgett:)

X Q. 26. Captain, did you know of the existence of this knuckle while you were down there?

A. Yes, sir.

X Q. 27. What effect, if any, had you noticed on the tide run-

ning to the westward, and you proceeding to the eastward, on your vessel?

A. At high water, where the knuckle makes out from the north bank, it has a tendency to cause an eddy, an offset towards the south bank,—and proceeding through to the eastward with your vessel it strikes the port bow of the vessel and causes a sheer which we always try to break when we come to that point.

X Q. 28. You say you knew the Bay Port?

A. Yes, sir; seen her a great many times.

X Q. 29. Assume that when she struck the first time she was drawing 18 feet, 3 inches, aft, and about 17 feet, 6, forward, and that the water had been in her and had been pumped until the pumps sucked dry; and that when she came off suddenly she was somewhere about a foot to 18 inches by the head; and assume that you, as master of the vessel, understood that there was 25 feet depth of water throughout the rest of that canal at mean low water, and it was about half tide on the flood tide, whether or not, in your judgment, it would have been prudent to go through the canal, or would you have tied her up?

Mr. Pillsbury: Just a moment. I do not understand that there is any evidence in the case that the water had been pumped until the pumps sucked dry.

Mr. Blodgett: There will be.

Mr. Pillsbury: You intend to offer that, do you?

Mr. Blodgett: Yes.

A. The vessel had been sucked dry?

X Q. 30. Had been sucked dry, and the water had come in again, and the pumps had been going all night; the pumps would suck, and then water would come in again, and they would pump again, and when she came off, as I say, she had water enough in her so that she was down approximately 15 to 18 inches by the head,—however much that was?

A. With a 25-foot draft for the depth of water?

X Q. 31. Yes.

A. The vessel—you could see how she behaved. I should
464 have thought it prudent to proceed through, if the tide—

X Q. 32. With a tug ahead, and if the vessel after she came off steered all right for the first half mile, about, would you have thought it safe to proceed?

A. I should have.

X Q. 33. If she had steered all right down as far as these dolphins, would you have thought it safer to proceed than to tie her up, assuming you had a depth of 25 feet?

A. Yes, sir.

X Q. 34. If the vessel, after she came off, under the influence of the tide with her and the speed of the tug and her own engines, had proceeded and got under control and steered properly for a distance of quarter to half a mile, and then suddenly began to sheer

badly, a sheer which could not be broken, what would you say, from your knowledge of the canal, was the difficulty?

A. She has evidently felt shoal water.

(By Mr. Pillsbury:)

X Q. 35. Supposing there was not any shoal water, captain, at the place she sheered; what would you say was the difficulty?

A. There wasn't any shoal water?

X Q. 36. There wasn't any shoal water.

A. I should say if the vessel had proceeded a matter of 800 feet, as we spoke of before, and proceeded all right, I don't see why she wouldn't proceed the rest of the way all right.

X Q. 37. That does not quite answer the question. I was supposing she did sheer where there was not any shoal water. You told Mr. Blodgett if she sheered it would be caused by shoal water if there was shoal water where she sheered. But suppose there was not any shoal water where she sheered what would you say was the cause?

A. I should say bad helmsman.

X Q. 38. Anything to do with her being down at the head?

A. With a tugboat ahead no, not to any extent, proceeding with a moderate rate of speed.

X Q. 39. You would not expect a whaleback down at the head in the way Mr. Blodgett described, in the Cape Cod Canal, to sheer at all if she was properly handled?

A. With the tugboat a proper distance ahead, very little.

X Q. 40. The tugboat does not prevent the sheer, does she;
465 she is there to break the sheer if it occurs?

A. I have seen tugboats start sheers on vessels.

X Q. 41. Do you know much about these whalebacks?

A. No, sir; never handled any.

X Q. 42. You do not know whether they steer badly or not when they are down at the head?

A. I couldn't say.

X Q. 43. All vessels steer badly if they are down at the head, do they not?

A. Some worse than others.

X Q. 44. A vessel with no keel, with a flat bottom, that is built to be up at the head, would naturally steer badly if she were down at the head, would she not?

A. Naturally.

X Q. 45. And if that vessel took a sheer in a canal where there was a current and where there was no shoal water at the point that she took the sheer, and she was down at the head as I have described, would it not be reasonable to attribute the sheering to her being down at the head, rather than to the helmsman?

A. Perhaps a little of both, I should figure.

X Q. 46. You think if the helmsman had been all right and skilful, even with the vessel in that condition, he ought to be able to control the ship, do you?

A. Not the helmsman alone.

X Q. 47. The helmsman and who else?

A. And the man who was watching the ship.

X Q. 48. Well, he would direct the helmsman what to do, would he not?

A. Yes, sir.

X Q. 49. Assuming that the directions were given, and the helmsman acted as best he could, you think that this sheer would not have been caused by her being down at the head?

A. Not the rank sheer that I have heard in the testimony.

X Q. 50. Which sheer are you talking about now?

A. The sheer I heard spoken of yesterday.

X Q. 51. Well, which day?

A. Not yesterday, but day before yesterday.

X Q. 52. I mean, which day was the sheer that you have in mind, the first day, or the second day?

A. The second day.

X Q. 53. The second day?

A. Yes, sir.

466 X Q. 54. You heard about a good many sheers the second day, did you not?

A. Evidently.

X Q. 55. You did not have in mind that she sheered only once the second day, did you?

A. All I remember in the testimony is, with regards to the ship, that she took towards the north bank,—or the south bank.

X Q. 56. That is what you recall about the sheering of the ship?

A. That is what I recall.

The Court: How close does a vessel's bottom have to go — the land, to the ground, to have it affect her steering?

The Witness: It depends upon the speed.

The Court: Suppose she is going with her engines dead slow?

The Witness: Going slow?

The Court: Yes.

The Witness: Making perhaps three or four knots?

The Court: Yes.

The Witness: I should say in three feet of water.

The Court: If there was three feet of water under her, she would get no bottom effect?

The Witness: She may feel it a little bit.

The Court: But not noticeably?

The Witness: Well, depends upon the place. If the channel is wide, she wouldn't feel it as much as if it was a narrower channel. There is a difference perhaps of whether it is 60 or 200 feet wide.

X Q. 57. Suppose it is a 100-foot channel?

A. I should say she would.

X Q. 58. She would what?

A. She would feel the shoal.

X Q. 59. You say she would need three feet of water. What width of channel would you require for the three feet?

A. Perhaps 200,—250.

X Q. 60. Now, for your 100 feet what would she require?

A. I should say three to four, proceeding at five knots,—four or five knots.

The Court: You mean through the water?

The Witness: Through the water; yes, sir.

467 The Court: Of course, if the vessel is practically drifting, as long as there is water under her at all, it does not affect the steering?

The Witness: It does not affect her,—none at all.

(By Mr. Blodgett:)

X Q. 61. How much water, in your judgment, should a steamer like the Bay Port plan to have under her to steer properly, going at the speed of five knots, in the Cape Cod Canal?

A. I should say four to five feet.

(By Mr. Pillsbury:)

X Q. 62. When Mr. Blodgett asks you a question, you raise it a foot. Isn't that just the question I asked you, and you said four feet?

A. Four or five I told Mr. Blodgett, didn't I?

X Q. 63. Yes, and didn't you tell me four?

A. Yes, possibly.

Mr. Pillsbury: That is all.

MICHAEL J. BRENNAN (sworn).

(By Mr. Park:)

Q. 1. Your full name, captain?

A. Michael J. Brennan.

Q. 2. Are you a licensed pilot?

A. Yes.

Q. 3. How many years?

A. About twelve years.

Q. 4. Out of Boston?

A. Yes, sir.

Q. 5. With the Boston Towboat Company?

A. Commercial Towboat Company.

Q. 6. Commercial Towboat Company. Towing on the coast?

A. Yes sir.

Q. 7. Are you familiar with the Cape Cod Canal?

A. Yes, sir.

Q. 8. How long have you been familiar with those waters?

A. Well, about a year before it opened.

Q. 9. Were you on the Salvor at the time she left Boston to go down to the canal at the time the Bay Port was ashore?

A. Yes, sir.

Q. 10. Do you know Captain Joseph Lewis?

A. Very well.

Q. 11. Do you know pilot William Lewis?

A. Yes, sir.

Q. 12. Were you on the Salvor at the time the Bay Port slid off the bank?

A. Yes, sir.

Q. 13. Do you know at that time where pilot Lewis was?

A. Yes, sir.

Q. 14. Where was he?

A. He was on the bridge of the ship.

468 Q. 15. Which ship?

A. The Bay Port.

The Court: I did not get the name of your vessel, of the vessel that you were on.

The Witness: The Salvor,—the lighter Salvor.

Q. 16. At that time where was the tug John C. Stuart?

A. Under the port quarter of the Bay Port.

Q. 17. Previous to that time had she been giving you water?

A. Yes, sir; alongside the Salvor.

Q. 18. She had been giving you water before that time?

A. Yes.

Q. 19. When the Bay Port came off the bank, did you hear any conversation between pilot Lewis and Captain Lewis; and, if so, what was it?

A. Captain Lewis sang out: "There she goes."

The Court: Which Lewis?

The Witness: Captain Joseph Lewis. And Captain William Lewis says: "Yes. Get your lighter away." He says: "Have you got her?" He says: "Yes; let go your lighter."

The Court: You say "He says: 'Get your lighter away.'" That is, William Lewis said that?

The Witness: Yes, sir.

The Court: Now, who said "Have you got her?"

The Witness: Captain Joseph Lewis.

The Court: Joseph Lewis, who was standing on the lighter?

The Witness: Alongside of it; yes, sir.

The Court: Joseph Lewis hollered: "Have you got her?"

The Witness: Yes, sir.

The Court: And what was the answer to that?

The Witness: "Yes, I have got her,—let go your lighter."

The Court: W. Lewis said: "Yes, I have got her,—let go your lighter"?

The Witness: "Let go your lighter."

Q. 20. Did you afterwards go down in tow of the tug John C. Stuart?

A. Yes.

Q. 21. Did you hear any orders given by Captain William Lewis, the pilot, subsequent to those?

A. No, sir.

Q. 22. Who stood there on the deck of the Salvor with you?
469 A. Well, there was the captain of the Salvor, Captain Daly, and Captain Lewis was on deck. I didn't notice anybody else.

Q. 23. Did you hear any orders at all given by Captain Joseph Lewis?

A. No, only the orders to us about discharging cargo out of the ship.

Q. 24. That was the orders to the Salvor's crew about discharging cargo?

A. Yes.

Q. 25. You had been discharging cargo, I understand, from the Bay Port?

A. Yes, sir.

Cross-examination.

(By Mr. Pillsbury:)

X Q. 26. Where was Captain Hammett of the Bay Port when she went off?

A. On the bridge, sir.

X Q. 27. On the bridge of the Bay Port?

A. Yes, sir.

X Q. 28. Where was the first mate?

A. I don't know, sir; I couldn't say.

X Q. 29. Now, were there two men on the bridge of the Bay Port when she slid off?

A. Yes, sir.

X Q. 30. Where were you when she went off?

A. On the deck of the lighter Salvor.

X Q. 31. And you were at the same point when you heard Joseph Lewis say "There she goes"?

A. Yes, sir.

X Q. 32. What was the first order given to you after you heard him say "There she goes"?

A. "Cast off them lines" that we had to the ship.

X Q. 33. "Cast off your lines." Those were the lines of the Salvor, attached to the Bay Port?

A. On to the Bay Port; yes, sir.

X Q. 34. Who gave you that order?

A. Captain Lewis, Joseph Lewis.

X Q. 35. You see we have got two Lewises.

A. Joseph Lewis,—Captain Joseph Lewis.

X Q. 36. Did you see her as she began to move, yourself?

A. Yes, sir.

X Q. 37. And will you just describe what took place, in your own way? Tell us what you observed about it?

470 A. We were changing buckets,—had been discharging some coal from the steamer and apparently were not getting the coal out fast enough and started to change the bucket. While handling around some of the wires connected with the bucket,

the ship apparently started very slowly right up the channel; and Captain Daly sang out—

X Q. 38. Did she come off the bank at the same time?

A. Yes, sir, she came right off bodily, right out from the bank and up to the eastward. Captain Daly sang out "There she goes."

X Q. 39. Captain who?

A. Daly. Captain Lewis had been—

X Q. 40. Let me interrupt you there. I thought you testified on direct that Captain Lewis was the one who sang out "There she goes." Was it Captain Daly?

A. I was asked about—Captain Daly sang out first; he seemed to be the first one to have noticed that the ship was under way.

X Q. 41. Then it was Captain Daly that sang out "There she goes"?

A. To Captain Lewis, letting him know. He sung out and said: "There she goes, captain."

X Q. 42. That is, to Captain Joseph Lewis?

A. To Captain Joseph Lewis on the Salvor.

[No cross-question numbered 43.]

X Q. 44. They were both of them up on the Salvor?

A. Yes, very close to each other.

X Q. 45. Captain Daly said to Captain Joseph Lewis "There she goes"?

A. "There she goes." And Captain Lewis looked up and saw the ship going, and looked around, And he sung out very loud "There she goes." William Lewis was on the bridge of the ship; and he says: "Yes,—let go your lines." And the ship started and proceeded along through the canal.

X Q. 46. Did you hear Joseph Lewis say to William Lewis "Have you got her?"

A. Yes, sir.

X Q. 47. That was when she was going off?

A. Yes, sir.

X Q. 48. He called up to him "Have you got her?"

A. Yes, sir.

X Q. 49. And did you hear pilot Lewis reply to that?

A. Yes, sir.

X Q. 50. And did you hear pilot Lewis ask Joseph Lewis if he should tie up at Sandwich?

A. I don't remember.

X Q. 51. Were you here when one of your shipmates was testifying yesterday about this?

A. I was here yesterday; yes, sir.

471 X Q. 52. I want to see if you agree with him. Do you recall his testifying that William Lewis asked if he should tie up at Sandwich, and Joseph Lewis said "Yes"?

A. I don't remember, sir.

X Q. 53. Well, now, try to think, yourself, whether anything of that sort took place. Was there something said about tying up at Sandwich?

A. There may have been while I was busy letting go the lines; I know there was a lot of conversation going on between different people. I was busy letting go the lines.

X Q. 54. About as soon as you heard these shouts,—that is, "Let her go," etc., "Have you got her," the order was given to you to let go the lines?

A. Yes, sir.

X Q. 55. And you did not pay any more attention to what took place except your own work of letting go the lines?

A. That is about all.

X Q. 56. I suppose you had to act pretty quickly?

A. Yes, sir.

(By Mr. Blodgett:)

X Q. 57. Captain, did you notice the Bay Port as she went off down the canal?

A. After the lighter let go of her?

X Q. 58. Yes.

A. Well, no; I was kind of busy with the other tugboat, the Stuart, making fast alongside.

X Q. 59. You couldn't say how she went, whether she went all right or whether she was sheering?

A. I gave glances at her, of course; saw her going apparently all right.

X Q. 60. How far away was she the last time you saw her?

A. Well, I should judge a quarter of a mile.

X Q. 61. And apparently then she was going all right?

A. Yes, sir.

X Q. 62. Did you notice that she was down by the head when she came off?

A. Yes, I noticed that she had a slight—

X Q. 63. Captain, if you had been master of that vessel and she had come off, being in the condition that you saw her, down by the head, and going along all right as you saw her going along afterwards, and you had understood that the mean low water depth in the canal was 25 feet, what would you have done with her?

A. Proceeded through the canal.

X Q. 64. Did you ever know of this knuckle, so called?

A. Yes, sir.

472 X Q. 65. And have you ever been by there and noticed its action on vessels?

A. Yes, sir.

X Q. 66. What was the action in that locality on vessels with reference to sheering when they were going against the tide running from the east to the west?

A. They generally strike the port bow of the ship and send it to the south bank.

X Q. 67. How much of a sheer would that give?

A. Well, a good many times it depended on the position of the vessel that you had in tow and the speed of her.

X Q. 68. Was it noticeable,—the action of the current?

A. Yes, sir.

X Q. 69. And had that been there ever since the canal was constructed?

A. Yes, sir.

X Q. 70. Do you know how that knuckle happened to be there?

A. Well, I heard—

Mr. Pillsbury: Just a moment. This has been over a great many times. I don't believe hearsay would help us.

X Q. 71. You were there when the canal was being built?

A. Yes, sir.

X Q. 72. What did you see, if anything, in reference to this knuckle at that time?

A. Well, it was the last—it was where they really broke through the canal.

X Q. 73. And after they broke through the canal and let the water in, was that ever finished, to your knowledge?

A. No, sir; it was always left there.

(By Mr. Pillsbury:)

X Q. 74. If you had been captain of the ship, as Mr. Blodgett asked you, when she went off the bank, and there was a good deal of water in her so that she was down at the head, would you have thought it prudent to hold her in the deep water at the point she came off until you had got that water pumped out, before you attempted to navigate the canal?

A. If there was deep water through the canal?

X Q. 75. Never mind,—well, yes, whether there was deep water or not.

A. Yes, sir.

[No cross-interrogatory numbered 76.]

473 X Q. 77. That is, there is no question that the vessel in the condition that you saw her as she went off was difficult to manage in a narrow waterway such as the Cape Cod Canal?

A. Well, she wouldn't manage as well as by a drag of a foot or foot and a half by the stern,—but they will manage.

X Q. 78. That is, in order to manage properly, she ought to have a drag by the stern; that is, her stern should be deeper than her bow?

A. Yes, that is generally true.

X Q. 79. What was her trim when she came off that bank, as you observed it?

A. Well, I should say that she had a very slight dip by the bow.

X Q. 80. "Very slight." How slight?

A. Well, it was just noticeable, and that is about all; I think it couldn't have been over 6 or 8 inches.

X Q. 81. How much water was there in her,—do you know?

A. I don't know, sir.

X Q. 82. If there was water in her which was only a few inches

below the top of the coal in the forward part, what effect would that have had on her trim?

A. It certainly would set her by the head.

X Q. 83. How much?

A. I don't know, sir.

X Q. 84. A good deal, would it not?

The Court: What is the use of speculating?

A. Considerable, if there was considerable water in her.

Mr. Pillsbury: I was going to come to the question of his observation.

X Q. 85. You say as soon as these orders were given you were busy looking after your ropes?

A. Yes, sir.

X Q. 86. And you were busy at your work for how long?

A. Well, probably a space of five minutes.

X Q. 87. Five minutes or so?

A. Yes.

X Q. 88. You did not look at the ship to observe her trim while you were doing that work?

A. Well, we were right alongside of her; and while the men on the ship were running from one end to another for to take our lines,—after we let go our lines, of course, I had an opportunity to view the ship, look her over.

X Q. 89. Do you think you really did attempt to observe her in relation to her trim at that time?

A. Well, by a natural glance that we always give a ship as we see them.

X Q. 90. Did she have any list?

A. Slight list; yes, sir.

X Q. 91. Which way?

A. To port.

X Q. 92. How much of a list, can you tell us?

A. Oh, very slight,—just noticeable,—barely noticeable.

X Q. 93. How close were you to the ship?

A. We were alongside of the ship then. The side of the Salvor—of course, she had rounding sides,—was within about six feet of the railing of the ship.

X Q. 94. And you were about amidships of her?

A. No; forward of amidships.

X Q. 95. Forward of amidships?

A. Yes, sir.

X Q. 96. Captain, there are a great many places in the canal where there are currents which make it more difficult to steer than in other places, are there not?

A. Yes, sir.

X Q. 97. And you have to exercise more care at those places than you do other places?

A. Yes, sir.

X Q. 98. And now at this particular point,—you have been by there a great many times on tows?

A. Yes, sir.

X Q. 99. And at all stages of the tide?

A. Yes, sir.

X Q. 100. And did you ever have any ship get out from under your control there?

A. No, sir.

Mr. Pillsbury: That is all.

The Court: How severe was the current at the time when the ship came off?

The Witness: At the time the ship floated?

The Court: Yes. Was it on the full strength of the current?

The Witness: Of the east current; yes, sir.

The Court: How many knots an hour?

The Witness: Well, I should judge about three to three and a half.

The Court: Thank you.

475 EUGENE FULLERTON (sworn).

(By Mr. Park:)

Q. 1. Eugene Fullerton?

A. Yes, sir.

Q. 2. Are you the engineer in charge of the Salvor?

A. Yes, sir.

Q. 3. That is, her hoisting engine?

A. Yes, sir.

Q. 4. The Salvor, as I understand, is without motive power of her own?

A. Yes, sir.

Q. 5. Were you down at the Bay Port in December of 1916 when she was ashore in the canal?

A. Yes, sir.

Q. 6. Were you alongside of her when she came off?

A. Yes, sir.

Q. 7. Where were you stationed?

A. In the engine room.

Q. 8. In the engine room, forward?

A. Yes, sir.

Q. 9. Where was Captain Joseph Lewis, if you know?

A. Aft of amidships.

Q. 10. Right aft of amidships. Do you know pilot William Lewis?

A. No, sir.

Q. 11. Did you hear any conversation between Captain Joseph Lewis, as the Bay Port came off, and anybody on the Bay Port?

A. I heard Captain Lewis say: "She is all yours."

Q. 12. You heard what Lewis say that?

A. Joseph Lewis.

Q. 13. He shouted to somebody on the Bay Port what?

A. I couldn't tell you what he said then.

Q. 14. No; but what did he say to somebody on the Bay Port?

A. Captain Lewis?

Q. 15. Yes.

A. Captain Joe Lewis?

Q. 16. Yes.

A. He said: "She is all yours."

Q. 17. You heard him holler that?

A. That is what I heard; yes.

Q. 18. Did you hear any reply?

A. No, sir.

Mr. Park: That is all.

Mr. Pillsbury: No questions.

ARTHUR J. DALY (recalled).

(By Mr. Park:)

Q. 97. Captain, what size anchors did you have on board the Salvor in the Cape Cod Canal?

A. One about 800, sir, one in the vicinity of 600; a kedge, 200, and three small kedges, lighter.

476 Cross-examination.

(By Mr. Pillsbury:)

X Q. 98. The Salvor had brought you down there in consequence of telephone directions of Joseph Lewis from Buzzard's Bay after he had been to see the boat stranded, had it not?

A. As far as I know.

X Q. 99. Well, you came down with the Salvor, did you not?

A. Yes, sir.

X Q. 100. And was the Salvor outfitted for wrecking purposes at the time you took her from Boston to bring her down?

A. General wrecking purposes; yes, sir.

X Q. 101. And did she have a full supply of anchors and cables and other appliances?

A. Not for beach work, sir.

X Q. 102. What supplies did she have?

A. For general wrecking, she was equipped.

X Q. 103. Equipped for general wrecking?

A. Yes, sir.

X Q. 104. Did you have in Boston other supplies?

A. Yes, sir.

X Q. 105. And could those other appliances, if it had been desired, have been loaded on the Salvor before she came down?

A. Yes, sir.

Mr. Pillsbury: That is all.

Redirect examination.

(By Mr. Park:)

Q. 106. Captain Daly, in reply to a question by Mr. Pillsbury you said you thought you were ordered from the Boston yard after Captain Joseph Lewis had seen the Bay Port. Do you know now who gave you the orders to proceed with the Salvor down to the Cape Cod Canal?

A. I think it was Mr. Smith, sir. Through the phone I got my orders.

Q. 107. Do you know what time you got those orders?

A. I should judge in the vicinity of five o'clock. I was unloading sheet piling from the Salvor at the South End,—City dock.

Q. 108. Do you know whether the order came from the Cape Cod Canal?

A. I couldn't say, sir.

Q. 109. But you got it about five o'clock in the afternoon?

A. Yes, sir.

Q. 110. What did you do in order to fulfill those orders?

477 A. When we finished discharging, we got a tugboat which was sent to us, and we towed with the tug to East Boston, to the Boston Towboat Company's, where we got provisions and men and other material for to proceed to the canal.

Mr. Park: That is all.

Mr. Pillsbury: That is all.

HENRY M. PENDLETON (sworn).

(By Mr. Park:)

Q. 1. Henry M. Pendleton?

A. Yes, sir.

Q. 2. Mr. Pendleton, are you one of the officers of the T. A. Scott Company?

A. I am.

Q. 3. And do you have charge of making out and taking care of salvage claims on behalf of the Scott Company?

A. Yes, sir.

Q. 4. Did you have charge of the Bay Port matter?

A. Yes, sir.

Q. 5. Was any bill rendered by you on behalf of that company against the White Oak Transportation Company for services on the canal in relation to the Bay Port?

A. There was.

Q. 6. And paid?

A. It was paid.

Q. 7. Did that include the operation of getting her off or for watching and caring for her down at the east end?

Mr. Pillsbury: One moment. I suppose the bill is available.

Mr. Park: I don't know. Captain Scott made a remark, in answer to your question, that as far as he knew the bill had been paid. I only put it in for that purpose.

Mr. Pillsbury: To show the bill was paid?

Mr. Park: To show it was paid; yes.

Mr. Pillsbury: I thought you were going to ask what services it covered; and I thought if that was being asked, the bill would be the best evidence.

Q. 8. This is my question: If a bill was made out to cover the services of getting her off the bank?

A. Do I understand you, the first sinking?

Q. 9. Yes.

A. No bill; no, sir.

Mr. Park: Now, if you want him to explain why, he is your witness. I don't think I can ask him. I would like the truth to come out,—I don't care by whom it comes.

478 Mr. Pillsbury: I am with you on that, Mr. Park.

Mr. Park: I will ask him if you have no objection to the question.

Mr. Pillsbury: I want to find out a little more about the matter. It is not quite clear in my mind.

Cross-examination.

(By Mr. Pillsbury:)

X Q. 10. You say the bill was rendered to whom by the Scott Company?

A. To the White Oak Transportation Company, the owners of the ship.

X Q. 11. When was that bill rendered?

A. The end of December, 1916; I should say it was the 30th or 31st; probably the 30th.

X Q. 12. Have you got that bill?

A. The bill we rendered them? No, sir,—that was sent to them. We have a copy of it.

X Q. 13. Well, that will do.

A. I haven't it with me, sir; it is in our records in the office.

X Q. 14. Will you produce it?

A. I will do so if you will give me time.

Mr. Pillsbury: I will be very glad to; and I will suspend any further examination until you get it.

Mr. Park: This case will probably go on until Monday, and we will get it here before that.

Your Honor, I wish to introduce the testimony of William Murray McDonald, a witness on behalf of the T. A. Scott Company.

[Mr. Park files the deposition of William Murray McDonald.]

Mr. Park: Is the incorporation of the T. A. Scott Company admitted by everybody?

Mr. Pillsbury: Yes.

Mr. Park: The incorporation of the T. A. Scott Company is admitted. There are some interrogatories which have been filed—

The Court: You want to put all the interrogatories in, do you?

Mr. Park: Yes, as they stand now.

Mr. Pillsbury: The interrogatories that you filed to us, do you mean?

Mr. Park: Yes, all the interrogatories between us.

Mr. Pillsbury: I put in part of them, I think.

Mr. Park: With that, your Honor, we rest.

The Court: Let me take the McDonald evidence, Mr. Park,
479 and I will be running that over. That is the case of the Scott Company?

Mr. Park: Yes, except for the witness Timmans, who is not here now, but will be here later.

There is another matter which I want to call to your Honor's attention. On January 24, 1917, Captain Joseph Lewis came to my office and called in a stenographer, and he dictated a statement of the notes about this case. I have that here. Counsel have agreed, I believe, that we need not call the stenographer who took this statement. She has the notes, and this is the transcript. Of course, the intervening petition was not filed until along in May, but this was taken a few days after the suit was brought against the White Oak Transportation Company and against the Scott Company by the Canal Company.

The Court: I should be inclined to rule against you on that, even under the Massachusetts statute. I think that statute uses substantially the words *ante litem motam*, does it not,—or that is the effect of it?

Mr. Park: I would not question whatever your Honor said about the statute. I am not familiar with it.

The Court: I should be pretty clear that a statement taken after the case was started is not admissible.

Mr. Park: But it was taken a long time before the case here was started. This is in January, and that case was not started until May.

The Court: What was started before this statement?

Mr. Park: The Canal Company brought suit against the T. A. Scott Company for obstruction of the canal, for damages—\$60,000; they brought suit against the White Oak Transportation Company for \$60,000 for obstruction of the canal.

The Court: Those suits were brought before the statement was made?

Mr. Park: Yes, those were brought practically the same time, January 7th or 8th,—in there somewhere; and that statement was made January 24th.

Mr. Pillsbury: I should point out that of course the Scott
480 Company was not cited in by the petition under Rule 59 until after the statement was taken.

Mr. Park: A long time after.

Mr. Pillsbury: I should suppose the statement might be admissible so far as the White Oak Company is concerned. Now, the

effect of the petition, as I understand it, is to make the Scott Company codefendant with us in their suit. I should think it might be admissible in that suit, but would not be admissible in the case which we had brought against the Scott Company.

Mr. Park: It seems to me it is not fair to the Court to ask you to receive that in one case and exclude it in another when there has been by agreement a consolidation of the cases, and they are being tried together.

Mr. Blodgett: They are not consolidated, Mr. Park.

Mr. Park: If the Court can use it only in one case, I do not think it is fair to ask the Court even to take it.

The Court: If it is not objected to, of course it can go in. If it is objected to, I do not think it is admissible.

Mr. Pillsbury: I object to it.

Mr. Park: Then I do not ask for its admission. There were some notes made at the time by Captain Lewis, which I have not examined, and I reserve the right to offer them in evidence.

The Court: Those I think have been offered.

Mr. Park: No; I refer to some handy notes he made down there *there* at that time. This is the report he made to the Scott Company.

Mr. Pillsbury: You say you have not examined those yet?

Mr. Park: No, I have not seen them.

Mr. Pillsbury: Of course, I would like to have any evidence such as that as early as possible.

The Court: We do not try these cases like jury cases.

Mr. Pillsbury: I would like to see it in time to have a chance to prepare my evidence in rebuttal.

The Court: If you require additional preparation, we will take that up.

481 *Evidence for the White Oak Transportation Company.*

Opening Statement of Edward E. Blodgett, Esq., on Behalf of White Oak Transportation Company.

Now, your Honor, in reference to the White Oak Transportation Company, it is agreed that the White Oak Transportation Company was a corporation as alleged in the libel, and was the owner of the steamer Bay Port.

I presume I ought to ask, on behalf of Mr. Warner, as he is not here, that the same agreement he made in reference to the cargo of coal which he represents, and that those formal allegations in his libel or in the petition be agreed to be taken as true.

Mr. Pillsbury: That is assented to.

Mr. Blodgett: I also want to read into the record, from the list of merchant vessels of the United States, the following facts with respect to the steamer Bay Port: "Gross tonnage, 1,399; net tonnage, 1,075; length, 265 feet; breadth, 38 feet; depth, 24 feet."

She had a cargo on board of 2,393 tons.

Before putting on my evidence, as long as the pleadings have not been read, I want to call attention to some matters in the libel, which I think will simplify the question.

The Canal Company, in all its pleadings, makes no claim of improper management on the part of the Bay Port or improper steering. The allegation in their answer to our libel on that point is as follows:

"When the Bay Port reached a point a short distance west of Bournedale, she suddenly became unmanageable and took a quick sheer to starboard. All proper steps were taken to check the sheer, and to enable her to recover her course, but the Bay Port, nevertheless, struck the south bank and stove one small hole in her starboard side forward of midships. The tugs John C. Stuart and Hazelton responded to a call for assistance and an attempt was made to get siphons into the Bay Port, which attempt failed owing to the absence of manholes or small hatches into which the siphons might be introduced. The Bay Port remained with her bilge resting on the south bank at the point at which she struck."

482 Then coming to the part of their answer where it says that the next morning the Bay Port came off, they say that she came off and began to float eastward with the tide. They further say:

"In this emergency William Lewis of the Cape Pilot Association, a pilot licensed by the United States Government, stepped from the Hazelton on board the Bay Port. Under his orders the captain of the Bay Port started his engines and with a hard-a-port wheel straightened out the Bay Port——"

The Court: What is this you are reading from?

Mr. Blodgett: Their answer to our libel.

—"and with a hard-a-port wheel straightened out the Bay Port, which was drifting broadside and toward the north bank. The Dalzelline very quickly got a hawser on her bow. After she had moved about half a mile and just as the Hazelton caught up with her, she sheered to port. Proper orders were given to check the sheer, but the Bay Port nevertheless struck on the north bank. Her stern swung to the south bank and her bow away from the north bank, and she then sank diagonally across the canal with her stern on the south bank."

The allegations of fault on the part of the Bay Port are as follows:

"(a) In causing the Bay Port to enter the canal when she was very difficult to steer and control and was apt to become unmanageable and to fail to answer her helm, which fact was known to the libellant or which reasonably should have been known to it;

(b) In attempting to navigate the canal with a steamer which was very difficult to steer and control and was apt to become unmanageable and to fail to answer her helm, which fact was known to the libellant or which reasonably should have been known to it;

(c) In attempting to navigate the canal with a steamer which was difficult to steer and control and which was not provided with manholes or small hatches on the deck into which siphons might be introduced in case of emergency;

(d) In neglecting properly to care for the Bay Port while she was resting on the bank subsequent to the accident of December 13th and in negligently suffering her to slide off the bank at a time when the libellant was not prepared to complete the navigation of the canal by the Bay Port, as a result of which negligence she sank in the channel."

483 Your Honor will note there they state "when the libellant was not prepared to complete the navigation;" that is, we were not.

"(e) In negligently permitting the Bay Port, subsequent to the accident of December 13th, to become afloat in the canal in an unsafe condition for navigation and in negligently failing to be prepared to complete the passage through the canal by the Bay Port, as a result of which negligence she sank in the channel;

(f) In neglecting to remove the Bay Port from her sunken position in the canal, though repeatedly requested by the defendant so to do, and allowing the Bay Port to remain to be removed by the defendant;

(g) And in other respects as will appear at the trial."

JOSEPH TILLOTSON DRAKE (sworn).

(By Mr. Blodgett:)

Q. 1. What is your full name?

A. Joseph Tillotson Drake.

Q. 2. How old are you?

A. Thirty-two.

Q. 3. What is your occupation?

A. I am instructor in navigation at present; formerly a steamboat inspector.

Q. 4. In 1916, were you a United States steamboat inspector?

A. Yes, sir.

Q. 5. How long had you been such an inspector?

A. I entered the service on the 23rd of December, 1915.

Q. 6. And did you, in 1916, inspect the steamer Bay Port?

A. I inspected the repairs being put on her.

Q. 7. And when was that?

A. It was in September and October, as near as I recollect.

Q. 8. Where was the Bay Port at that time?

A. She was in Simpson's dry dock, East Boston.

Q. 9. And how extensive repairs were made upon her at that time?

A. As I remember, there were seventy some odd plates taken out of her bottom from the keel up to the turn of the bilge on each side, covering tanks No. 1 and 2 and 3.

Q. 10. Do you know how much the changes, the repairs that were made in her at that time, cost?

A. Why, no, I do not, except that I understood they were over \$100,000.

484 Q. 11. It was a large amount of money?

A. A large amount of money; yes, sir.

Q. 12. And in your opinion, and under your inspection, was she put in proper shape?

A. Yes, sir.

Q. 13. And did the United States issue a license for her after those repairs were completed?

A. I don't believe the certificate had ever been taken from her; there was no record of it.

Q. 14. I will show you that, and ask you if that is a certified copy of her certificate?

A. Yes, sir, it is.

Mr. Blodgett: And, Mr. Pillsbury, this runs from March of 1916 to March of 1917. You called for this, Mr. Pillsbury, and I produce it. I will offer this.

[The certificate is marked as "Bay Port Exhibit 13."]

Q. 15. And what do you say was the condition of that vessel as to seaworthiness, for the carrying of a cargo of coal of 2,400 tons, when she left Simpson's dry dock in October, 1916?

Mr. Pillsbury: Just one moment. Did you mean the condition of her repair?

Mr. Blodgett: Yes, condition of repair.

Mr. Pillsbury: I do not object to that.

Q. 16. What was her condition?

A. She was in good condition.

Q. 17. Was her steering gear in good condition?

A. Yes, sir.

Q. 18. That was overhauled, was it not?

A. Why, I don't see as we say about that. I believe it was,—the general repairs that were called for were in the hull.

Q. 19. You do not remember specifically about the steering gear?

A. I do not remember specifically the steering gear.

Q. 20. You went all over the vessel, of course?

A. Yes, sir.

Q. 21. And everything was in order?

A. Yes, sir.

Q. 22. Did she have any holes that were built so that she could put a siphon pump down in addition to her own pumps, as far as you knew?

A. Why, she was hatches from one end to the other,—amidship hatches for loading and discharging cargo.

Q. 23. And, in your judgment, did she require any extra holes for the purpose of putting down siphons to run through the cargo?

A. No, sir.

485 Q. 24. Do you know of any vessels of her type or class that are equipped with such siphon holes?

A. I have never seen any; no, sir.

Q. 25. In reference to the pumps that she had, did she have a full equipment according to law?

A. She had more than she was required to have.

Q. 26. And of how much force was her steam pump, do you remember; I mean, was it a 6-inch pump or 8-inch pump,—8-inch discharge?

A. The bilge pump, you are speaking of?

Q. 27. The bilge pump I am speaking of.

A. Her bilge pump, I believe, was a duplex 12-inch diameter discharge,—that is, the discharge cylinder; and a 12-inch stroke.

Q. 28. Would that show definitely in the certificate? I don't want to take the time to look it up.

A. I believe it does; yes.

Q. 29. And so far as you, in your official capacity, could see, it was in proper condition to operate?

A. Yes, sir.

Mr. Blodgett: That is all.

Cross-examination.

(By Mr. Pillsbury:)

X Q. 30. No structural changes were made in the ship at that time, were they?

A. None that I know of, except that she was strengthened considerably where it was needed; that is, through deterioration,—just replacing old material.

X Q. 31. This was a matter of repair, putting her into proper repair; but there was no structural change at all?

A. No, sir.

X Q. 32. Her tanks and engines were the same?

A. Everything was the same as it had been.

X Q. 33. I don't know that I understand what you said about the cargo hatches. If there is cargo in the ship, you could not get water out through the hatches, could you,—through the cargo hatches; you would have to shovel your cargo out, supposing she was full of water, and get down to the water in the bottom, would you not, unless you had a siphon hole?

A. Yes, you would have to. The only water you could take out would be that that lay on top of the cargo.

Mr. Pillsbury: Yes. That is all.

Mr. Blodgett: That is all.

486 FRED N. HART (sworn).

(By Mr. Blodgett:)

Q. 1. What is your full name, captain?

A. Fred N. Hart.

Q. 2. What is your age, captain?

A. I am sixty years old in April.

Q. 3. What is your occupation?

A. I am a master mariner.

Q. 4. How long have you been to sea?

A. About forty years.

Q. 5. And do you have a master's license?

A. Yes.

Q. 6. Are you on some vessel now?

A. No, sir; I am——

Q. 7. What are you doing now?

A. Well, I am attending court and am on my vacation just now.

Q. 8. You are not connected with the White Oak Transportation Company?

A. No, sir; not any.

Q. 9. Were you on the Bay Port at the time of this accident in the Cape Cod Canal?

A. Yes, sir.

Q. 10. How long had you been on the Bay Port?

A. I don't remember. I had been only on two trips.

Q. 11. Had you been on other pig barges?

A. Yes, sir.

The Court: Do you mean you were in command of the Bay Port?

Mr. Blodgett: No; he was one of the officers, your Honor.

Q. 12. You were what officer on her?

A. I was second officer.

Q. 13. Second officer. What was her draft when she left Norfolk, do you remember?

A. 18, 10.

Q. 14. Aft?

A. Aft.

Q. 15. And what forward?

A. 17, 10, forward.

Q. 16. 17, 10, forward?

A. Yes.

Q. 17. In your judgment, was that a proper draft?

The Court: One foot difference?

The Witness: Yes, sir; one foot drag on leaving Norfolk.

Q. 18. In your judgment, was that a proper draft?

A. Yes, sir.

Q. 19. A proper way for her to come?

A. Yes, sir.

Q. 20. And proper draft for her?

A. Yes, sir.

Q. 21. When you came up to the canal were you on watch at all?

A. Yes, sir.

Q. 22. When you got up to the canal, before you started
487 through, did you look at her draft to see what her draft was then?

A. Yes, sir.

Q. 23. What was her draft?

A. Her draft was 18, 2, I called it, aft——

Q. 24. 18, 2?

A. Yes, sir, and 17, 6, forward, as near as I could tell.

Q. 25. 17, 6, forward. So that she still had a drag——

A. Yes, sir.

Q. 26. —by the stern?

A. Yes, sir.

Q. 27. Did you give that draft to the pilot?

A. I don't remember giving the draft.

Q. 28. Did you give it to Captain Hammett, do you remember?

A. I don't remember; no, sir.

Q. 29. You looked at it, yourself?

A. I looked at it myself; yes, sir.

Q. 30. Now, where were you on the Bay Port when you started from Wing's Neck?

A. I was on the poop, forward of the wheel-house,—on the bridge forward of the wheel-house.

Q. 31. The bridge of that vessel was aft?

A. The bridge was aft; yes, sir.

Q. 32. Was anyone with you, or were you standing there alone?

A. I think the first mate,—I am pretty sure the first mate stood with me, alongside of me.

Q. 33. Who was in the pilot-house?

A. The third mate, Mr. Maker.

Q. 34. And where was the captain?

A. The captain was up above the wheel-house, and the pilot also.

Q. 35. And the pilot?

A. Yes, sir.

Q. 36. That is, they were on a bridge over the wheel-house?

A. Yes, sir.

Q. 37. And the helmsman was in the pilot-house?

A. Yes, sir.

Q. 38. And you and, you think, the first mate were in front of the wheel-house?

A. Yes, sir.

Q. 39. And did you stay there all the way until the accident?

A. Yes, sir.

Q. 40. Well, now, how did the vessel proceed, after she started, with the tugboat on a hawser ahead of her? The pilot was on
488 board, and you started ahead. Just tell us how she proceeded.

A. Well, when we first started and after we got her straight-

ened up, of course, she steered all right, very nicely, until she passed through the bridge a certain distance.

Q. 41 which bridge?

A. Well, I call it the railroad bridge; I don't know.

Q. 42. You don't know what it was?

A. No. There were two bridges. After we passed through both bridges I should say about a mile, she took a very rank sheer to the southeast of the canal and went into the bank.

Q. 43. Had you had any trouble with her sheering before that rank sheer that you speak of?

A. Well, I don't remember any trouble before that; no, sir.

Q. 44. Anything that was noticeable to you?

A. No, sir; nothing out of the ordinary.

Q. 45. Before you came up into the canal did your vessel sheer badly, so far as you saw?

A. No, sir.

Q. 46. Did you at any time think there was danger, before you entered the canal, from your sheering, of your turning the tugboat over that was ahead of you?

A. None whatever.

Q. 47. About how many lengths do you think,—vessel's lengths,—it was from where you first noticed her sheer to where she struck finally?

A. Well, I should think it was about once the length of the ship as near as I could tell; that is, she sheered quite sharp to the bank.

Q. 48. Into the bank?

A. Yes, sir.

Q. 49. And did she stop suddenly, or did she slide along apparently?

A. Well, I think she slid along, I couldn't tell the exact distance, but very short distance, and fetched up wholly.

Q. 50. Before she sheered to the south bank had you noticed any sheer to the north bank?

A. I did notice a small curve to the port.

Q. 51. To the north bank?

A. To the port. And when they gave the order to change the wheel, she took a rank sheer to the starboard. If I remember right, she took a very small sheer to the port first.

Q. 52. You heard some order given. Who gave it?

A. The pilot gave the order, sir.

489 Q. 53. The pilot gave the order?

A. Yes, sir. I don't know the man, but I have seen him one or twice.

Q. 54. And did you see the man at the wheel obey the order and move his wheel at all?

A. Yes, sir.

Q. 55. And after that was done, and she broke that sheer, the vessel sheered over to the starboard?

A. Yes, sir.

Q. 56. And that time you say it was what you called a "rank sheer"?

A. Yes, sir.

Q. 57. Did you hear Captain Hammett give any orders on that boat after you entered the canal?

A. No, sir,—no.

Q. 58. Your vessel laid there over night?

A. Yes, sir.

Q. 59. Did you run your pumps?

A. Yes, sir.

Q. 60. Who had charge of that?

A. The chief engineer and the engineers.

Q. 61. Were your pumps run continually, do you know?

A. Yes, sir; running all the time.

Q. 62. Do you know anything about how much water there was in the vessel in the morning?

A. Well, I couldn't tell exactly, but there was some water in her. I couldn't tell,—it being down in the forepeak,—there was some in the forepeak, but she wasn't full. I should say probably four or five feet of water.

Q. 63. Four or five feet of water?

A. Yes, sir.

Q. 64. Did your pumps suck at any time during the night or morning?

A. I think the chief reported they did suck once; that is, after the diver came there, and the leak was stopped.

Q. 65. That was in the morning, early in the morning?

A. Well, somewhere near five; about five o'clock in the morning; yes, sir.

Q. 66. And after that the pumps were pumped until they sucked?

A. Yes, sir.

Q. 67. Do you know whether they were pumped again later on until they sucked, or not?

Mr. Pillsbury: Well, does he know anything about it except what he was told? He said the engineer told him.

Mr. Blodgett: Unfortunately the engineers are in France on other vessels.

The Witness: I beg your pardon; I noticed we were pumping all the time; and of course we kept the water out; that is, we could see down in the forepeak,—in one of those ships you can go down forward.

Q. 68. Tell us about the forepeak, as you call it, on this ship. How much cargo was there in depth in the forepeak?

A. There wasn't any cargo in what we call the "forepeak." That is the fore-castle where the men sleep.

Q. 69. But in the forward hold, how much cargo would there be in there in that type of ship, in depth,—do you have any idea?

A. You mean in the first hatch?

Q. 70. Yes.

A. Why, it would be the full depth of the ship; 12 feet I think.

Q. 71. Is there another forward hatch; that is, where the cargo is?

A. There is a bulkhead,—steel bulkhead.

Q. 72. Steel bulkhead?

A. Yes, sir.

Mr. Pillsbury: The full depth of the ship was what, did you say?

The Witness: I don't know the full depth of the ship.

Mr. Pillsbury: I thought you said some feet, and I didn't catch it.

The Witness: Probably she had somewhere near a 12-foot hold,—probably.

Q. 73. Now, in the morning she came off the bank?

A. Yes, sir.

Q. 74. Where were you then standing?

A. When she came off?

Q. 75. Yes.

A. I was in the wheel-house; I was standing on the starboard side of the upper deck, and I went into the wheelhouse as soon as she started, very quickly.

Q. 76. Where was Captain Hammett at that time?

A. I don't just remember where Captain Hammett was at that time; but soon after he was on top of the house over my head.

Q. 77. Did you see the pilot, William Lewis?

A. Yes, I saw a man I called the pilot; yes.

Q. 78. Where was he?

A. He was with Captain Hammett on top of the bridge.

Q. 79. And how shortly was that, after the vessel came off, that you noticed him on top of the bridge?

491 A. I should say it wasn't more than two or three minutes from when she first started. I didn't time it exactly.

Q. 80. Who took the wheel after she came off?

A. The third officer, Mr. Maker.

Q. 81. Was he a good helmsman?

A. Yes, sir; the best there was on the ship.

Q. 82. And the Dalzelline went on ahead of you?

A. There was a boat that went on ahead, and the Dalzelline I think was the name; yes, sir.

Q. 83. How did the vessel proceed then?

A. Proceeded very nicely.

Q. 84. She was then down by the head?

A. Well, slightly by the head,—no, I should say she was nearly on even keel,—a little mite of a list to port,—very little.

Q. 85. In your judgment, pretty near an even keel?

A. Yes, sir.

Q. 86. But a little by the head?

A. Yes, sir.

Q. 87. How did she handle?

A. She handled very nicely after we came off the bank.

Q. 88. How far did she continue to handle nicely?

A. I should say half a mile.

Q. 89. And then what happened?

A. She took a sheer and went to the port side of the channel.

Q. 90. Did she fetch up on the port side?

A. Yes, sir.

Q. 91. And then she went around and sank on the starboard side?

A. Well, she swung partly across the channel; yes, sir; on both sides.

Q. 22. And sank?

A. Yes, sir.

Q. 93. About how fast did you proceed after you came off?

A. What do you mean,—when we first started?

Q. 94. After you got started down the canal.

A. Probably three or four miles an hour.

Q. 95. Do you mean through the water, or over the ground?

A. I mean over the ground, with the current and through the water too. We were going very slowly at first.

Mr. Pillsbury: It would be different, wouldn't it?

Mr. Blodgett: I was going to ask him again.

492 Q. 96. Do you mean three or four knots over the ground?

A. I mean about three miles through the water,—speed of three miles.

Q. 97. Through the water?

A. Yes, sir. And the current,—I should say the current was practically a three-mile current, I should think by the look of it.

Q. 98. Can you give us any reason why your vessel sheered at that time?

A. Well, I don't know the reason; no, sir; but I can give you my opinion.

Q. 99. Well, what is your opinion as to why she sheered?

Mr. Pillsbury: I don't think he can do that.

The Court: Yes, he may answer.

A. Well, I should say, it being a narrow channel,—the canal,—and the ship drawing the depth of water she did, and being near the bottom, caused her to sheer.

Mr. Pillsbury: If your Honor please, my objection is that the conditions were not put in at all.

The Court: It is all right, Mr. Pillsbury. Go right on. I will save your exception.

Q. 100. Were you in the wheel-house at the time?

A. Yes, sir; I took the orders from the pilot.

Q. 101. Was the boat being properly handled?

A. She was properly handled.

Q. 102. As far as you could see?

A. Yes, sir; in every way.

Q. 103. If the vessel had gone along in the way she went the first half mile, would there have been any difficulty in taking her through the canal?

A. None whatever.

Q. 104. I neglected to ask you what your opinion was as to why she sheered the first day when she went ashore?

Mr. Pillsbury: The same objection.

The Court: Yes. You may answer.

A. Well, she steered very nicely until this certain place; and I noticed that there was some difference in the tide, as I call it; there was a swirl of the tide; by striking the port bow it caused the steamer to sheer. That is my opinion, of course.

Q. 105. You do not know anything about the depth of
493 water in the canal?

A. None whatever; I am no pilot there. I have been through there twice.

Q. 106. And been through on light vessels each time before?

A. I was through on this same boat, light.

Q. 107. Light?

A. Yes, sir.

Q. 108. And those are the only two times you had ever been through there?

A. Yes, sir.

Q. 109. Do you remember when you crossed the ferry,—do you know where the ferry is?

A. Yes, I remember it.

Q. 110. Do you remember about the place of the ferry,—did you notice any sheer there to starboard?

A. No, I don't remember any sheer at the ferry; no, sir.

Cross-examination.

(By Mr. Pillsbury:)

X Q. 111. The first sheer you remember this second day was when she struck?

A. Sir?

X Q. 112. The first sheer you remember the second day was when she struck?

A. I remember the first day the sheer when she struck.

X Q. 113. I am referring to the second day. I say, the first sheer she took the second day was the sheer on which she struck?

A. Yes, sir; that is, on the second time of going ashore, you refer to?

X Q. 114. Yes. And do you remember a dredging operation that was going on, that you passed, before she took that sheer?

A. Yes, sir; I think I do.

X Q. 115. There was a dredge,—they were dredging there, were they not?

A. Yes, sir.

X Q. 116. Was that the same sort of sheer that she took the day before, a quick, sudden sheer into the bank?

A. Well, pretty much the same; yes, sir.

X Q. 117. And she went into the bank inside of her length after she started to sheer, in the same way as the first day?

A. I couldn't say,—she went into the bank until she fetched up,—I couldn't say how far she went.

X Q. 118. But you told us that the first day she started to sheer

494 about her own length from the place she struck the bank, and I wondered if that was true the second day as well. Did the same thing happen the second day?

A. Well, not exactly; but she—when she got to this certain place on the second time, she took a sheer, a rank sheer, and went into the bank.

X Q. 119. In comparison with her length, how far did she go after she took the sheer first?

A. After striking the bank, do you mean?

X Q. 120. Not after striking the bank, but after taking the sheer.

The Court: After beginning the sheer?

Mr. Pillsbury: After beginning the sheer?

A. After beginning the sheer probably she went half her length.

X Q. 121. Half her length?

A. Yes, sir.

X Q. 122. So she did not go as far the second day before she struck the bank, after the beginning of the sheer, as she did the first day?

A. I should say not; no, sir.

X Q. 123. The first day, about her length?

A. Yes, sir.

X Q. 124. When you answered Mr. Blodgett's question as to what your opinion was as to the cause of her taking this sheer the second day, did you assume that at the point she took the sheer the water was shallow?

A. Well, I am not acquainted in the canal but I assumed that—

X Q. 125. Did you assume the water was shallow at that point?

A. Well, I think it might be shallow, or a current,—there was a different current seemed to strike the ship on the port bow at that certain place, on the first time.

X Q. 126. I am talking about the second time now.

A. The second time?

X Q. 127. Yes, the second day.

A. The second time, I think—the ship steered all right until she got to a certain place on the second time.

X Q. 128. Perhaps I did not make myself clear. Mr. Blodgett asked you what your opinion was as to the cause of that sheer that she took the second day.

A. Yes, sir.

X Q. 129. Do you remember that?

A. Yes.

495 X Q. 130. Now, in answering that question did you assume that the water was shallow at that point that she took that sheer?

A. He asked me my opinion, and I told him I thought on account of being shallow water she took the sheer; yes, sir.

X Q. 131. If, as a matter of fact, it was not shallow water where

she took the sheer, what would be your opinion as to the cause of the sheer?

A. I don't understand you. You mean if there is plenty of water under the ship?

X Q. 132. Yes.

A. She wouldn't have took the sheer.

X Q. 133. Well, it is impossible then for one of these pigs to sheer unless you are in shallow water; is that correct?

A. Well, I wouldn't say about that, because probably, you give her a wheel——

X Q. 134. Did you ever see one of them sheer where there was plenty of water?

A. They will sheer when you reverse the wheel; that is all the way,—they steer all right every other way.

X Q. 135. Does it have any effect on that if they are down at the head?

A. Those boats,—it don't have much effect.

X Q. 136. Does it have any effect on them?

A. None that I know of.

X Q. 137. No effect that you know of, whatever?

A. No, sir.

X Q. 138. They steer just as well down at the head as they do on even keel or with a drag at the stern?

A. I couldn't say that exactly,—we load them with a drag.

X Q. 139. Why do you load them with a drag?

A. On account of we using water and coal from aft, the ship lightens up aft, and therefore we give her a drag, on account of steering; I think that ship will steer as well on even keel as any other way.

X Q. 140. Did you ever see them on the lakes?

A. No, sir; I never was on the lakes.

X Q. 141. Don't you know, captain, that you load these whale-backs with a drag at the stern and that is the proper way to load them on account of their construction?

A. No, I don't know that,—no, sir. Some ships steer better with a drag, and some on even keel; but those ships carry their water and bunker coal aft; therefore, they load them, in one sense, a little more by the stern than they do by the head, because they are coming up aft all the time by using coal and water.

496 X Q. 142. What was your opinion as to the proper amount of drag at the time she cleared with her cargo,—what drag should she have?

A. I should say she was in proper trim.

X Q. 143. With the drag that she had?

A. Yes, sir; about a foot drag, or nearly that.

X Q. 144. Inasmuch as you were using your coal and water, as you have described, you could not maintain that drag, could you?

A. Why, surely not.

X Q. 145. Necessarily she would come up by the head and down by the bow, would she not, on a voyage?

A. "Up by the head and down by the bow"?

X Q. 146. No; the other way around; up by the stern and down by the head?

A. One of those ships, the way they are constructed,—if you have seen one of them out of the water——

X Q. 147. Just notice the question. Necessarily, in any voyage of any length, for the reason that has been stated, she would come up by the stern and go down by the head?

A. Naturally she would a little; yes, sir.

X Q. 148. So that if she were in proper trim at the time she left, she would not be in proper trim at the end of the voyage, would she?

A. Well, I can't agree with you there; no, sir; she being in proper trim,—we load her on a foot drag, and, using coal and water, she would be nearly on even keel at the end of the voyage, which I consider proper trim for one of those boats.

X Q. 149. That is, you think that an even keel is the proper trim?

A. Yes, sir.

X Q. 150. You do not think it is necessary to have any drag?

A. No, sir.

Redirect examination.

(By Mr. Blodgett:)

Q. 151. Did I get you right—my associate has called my attention to the fact that perhaps I am in error. Did she draw more at the canal forward than she did when she left Norfolk, or less?

A. Well, she drew less, I should think; she drew 17, 6, at the canal.

Mr. Blodgett: Yes. That is all.

The Court: 17, 10, at Norfolk.

497 The Witness: 17, 10.

The Court: That vessel had no keel?

The Witness: No, sir.

The Court: She had a spoon bow?

The Witness: Spoon bow.

The Court: No keelson?

The Witness: No, sir.

The Court: Then, as you go aft on her, there is a run to the stern?

The Witness: Yes, sir.

The Court: And a sort of skeg there that comes out?

The Witness: Yes, sir.

The Court: Do you tell me that a vessel like that steers well by the head?

The Witness: Well, I wouldn't say they steer so well by the head, but they steer as well on even keel,—they having a spoon bow and a skeg aft. That is my opinion.

Mr. Blodgett: That is all.

PERRY F. DUNTON (sworn).

(By Mr. Blodgett:)

Q. 1. What is your name, captain?

A. Perry F. Dunton.

Q. 2. How old are you?

A. Forty-nine.

Q. 3. How many years have you been to sea?

A. Since I was fourteen years old.

Q. 4. You are now a master mariner?

A. I am.

Q. 5. How long have you been a master mariner?

A. About twenty years, I guess,—since I was nineteen years old.

Q. 6. Have you had a master's license all that time?

A. I have had a steam license two years and a half.

Q. 7. Before that, a sail license?

A. A sail license; yes, sir.

Q. 8. Have you ever been acquainted with these pig vessels?

A. I have; I made three trips on the Bay Port and about eight months on the Bay View as master.

Q. 9. She was a sister ship?

A. Sister ship; exactly alike.

Q. 10. How much cargo would they carry?

A. From 2,300 to—

Q. 11. You were master on the voyages that you went?

A. I was master; yes.

Mr. Pillsbury: On this particular voyage?

Mr. Blodgett: No, not on this particular voyage.

Q. 12. What amount of cargo did you carry?

A. I carried from 2,350 to 2,425.

Q. 13. And that was the usual cargo for that vessel?

A. That was about the ordinary cargo for that vessel.

Q. 14. And what was the ordinary trim for those vessels on leaving Norfolk loaded with cargo?

A. What,—their length?

Q. 15. Draft.

A. Oh, the draft?

Q. 16. Yes, forward and aft.

A. Oh, I don't know as I could give the average; I have seen them as deep as 18, 10, aft, and usually just about a foot by the stern.

Q. 17. Foot by the stern?

A. Yes.

Q. 18. And, in your judgment, that is the proper way to load them?

A. Yes, that is all right. For that, I wouldn't be afraid to go if they was on an even keel.

Q. 19. They are loaded by the stern at the start so that, using up coal and water aft, they won't come up too high before they get to their destination?

A. That is the idea; yes.

Q. 20. That is the reason, is it not?

A. Yes, sir.

Q. 21. In other words, you don't want to get the vessel by the head, as you call it?

A. No, sir.

Q. 22. And why, captain?

A. Well, we never like to get a vessel down by the head, because they dive worse in a sea,—especially those pigs,—they dive worse in a head sea.

Q. 23. In still water, does it make any difference?

A. Not a particle; I would just as lief have them a foot by the head as a foot by the stern.

Q. 24. In still water?

A. Yes, sir.

Q. 25. In the Cape Cod Canal?

A. I never was in the Cape Cod Canal.

Q. 26. You never have been in the Cape Cod Canal?

A. No, sir; I never had the courage.

Q. 27. From your experience with the Bay Port how did she steer?

A. She was an average steering vessel, about the same as all lakers.

Q. 28. In still water how did she steer?

A. She steered good.

Q. 29. Did you have experience in docking her and undocking her?

A. I have.

Q. 30. Did you use a tugboat?

A. In some places we did; in Boston we used a tugboat.

Q. 31. And in some places you used your own steam?

A. In Bangor or Providence we docked under our own steam.

Q. 32. Did you go up narrow channels or rivers with her?

A. I have been to Bangor.

Q. 33. And did you have any difficulty in steering her?

A. Not at all.

Q. 34. And was she loaded as you have described, then?

A. Yes, sir.

Q. 35. How was she when she got up to Bangor, when you had her, with reference to being on an even keel or by the stern?

A. I should imagine she was about on an even keel on that particular trip.

Q. 36. And she steered all right?

A. All right.

Q. 37. Have you ever had any experience with those vessels sheer-ing on account of sucking the bottom?

A. Any vessel will.

Q. 38. Any vessel will?

A. Yes, that I have ever been in.

Q. 39. How much water should you say one of those vessels ought

to have under her in a place like the canal,—smooth water, but a current, to not smell bottom, going at a five-knot speed?

A. I should say five feet.

Cross-examination.

(By Mr. Pillsbury:)

X Q. 40. When were you on the Bay Port, captain?

A. I was on her in May and June of 1916.

X Q. 41. Where were your runs?

A. I made one trip to Bangor, one to Portland and one to Providence.

X Q. 42. From where?

A. From Norfolk and Newport News.

X Q. 43. You never had occasion to go through the canal?

A. No, sir.

X Q. 44. You said she steered about the same as all lakers.
500 What did you mean by "lakers"?

A. Vessels built on the Great Lakes.

X Q. 45. Of this whaleback type?

A. Any type. I have been in several,—in another different type,—and she steered worse than this thing did,—worse than the—

X Q. 46. What type is that?

A. It is more of the type they have down here, what they call a regular steamship,—but we don't call them that.

X Q. 47. Can you tell us what type it was that you have in mind?

A. Well, it is the regular steamship type, not the whaleback type, but freight steamship type.

X Q. 48. Don't lake boats steer as well as the sea boats?

A. No, sir.

X Q. 49. That is true of all of these lake boats?

A. I don't know all of them, but all I have been in and all I have seen going up and down the coast.

X Q. 50. What is the reason they don't steer as well as the others?

A. Because they are different construction; they are more full aft and more full forward; that is, they haven't got as good lines.

The Court: More like a canal boat?

The Witness: More like a canal boat; that is the idea exactly, your Honor.

X Q. 51. And this Bay Port was about the same as the others in type, was it?

A. Of the whaleback type.

X Q. 52. Would she handle better loaded or light?

A. She would handle better light.

X Q. 53. Would she handle better with a drag aft, or better without it?

A. I never could see any difference.

X Q. 54. Would she handle better down at the head, or on an even keel?

A. I never had her by the head,—I never had her down by the head. I have had her very near on even keel, and I couldn't see any difference.

X Q. 55. You never saw her down at the head?

A. I never did.

501 X Q. 56. From your general knowledge and experience, what would you say as to the effect on her handling if she were down at the head?

Mr. Blodgett: Do you mean in the ocean, or in still water?

Mr. Pillsbury: Anywhere.

X Q. 57. Would it make any difference where she was?

A. Yes, it would make a difference whether she was in rough water or smooth water.

X Q. 58. Take it in smooth water, and assume she was down by the head.

A. I don't think it would make any difference unless she was too far down by the head so that the wheel was out of water, or rudder was out of water.

X Q. 59. That is, unless your wheel or rudder was out of water, it would not make any difference?

A. I don't think so.

X Q. 60. And that would be true, I suppose, even if she were in a current, would it not?

A. Oh, yes, certainly it would.

X Q. 61. That is, the same thing would apply?

A. Yes, sir.

X Q. 62. If she were without any current, it would not make any difference if she were down at the head, she would steer just as well as if she were on even keel?

A. I think so, unless she was too far by the head.

X Q. 63. When you say "too far by the head" you mean so that the rudder or wheel would be out of water?

A. So they wouldn't have effect. When they are near the surface they don't have as much effect as they do down deep in the water.

Redirect examination.

(By Mr. Blodgett:)

Q. 64. What kind of a rudder did she have?

A. What we call a balanced rudder.

Q. 65. And that is a well-known type?

A. Yes, sir.

The Court: When these vessels get in a seaway, does the sea wash right over them?

The Witness: Yes, sir.

The Court: In going through rough water the waves go right over them?

The Witness: Yes, sir.

Mr. Blodgett: That is all.

502 HIRAM W. HAMMETT (sworn).

(By Mr. Blodgett:)

Q. 1. Give your full name, captain.

A. Hiram W. Hammett.

Q. 2. How old are you?

A. Sixty-one.

Q. 3. Where do you live?

A. At the present, in Dorchester.

Q. 4. How long have you been to sea?

A. About 45 years.

Q. 5. Have you a master's license?

A. Yes, sir.

Q. 6. For steam vessels?

A. Steam vessels.

Q. 7. How long?

A. Four years.

Q. 8. How long before that as a master mariner?

A. Twenty-seven.

Q. 9. In sail vessels, I suppose?

A. Sail vessels; yes.

Q. 10. Since you have been in steam vessels, what kind of vessels have you had experience with?

A. Well, lake vessels and towboats.

Q. 11. Lake vessels and towboats?

A. Yes, sir.

The Court: You have been master of steam vessels, you said, four years.

The Witness: I have had a license four years; yes, sir.

Q. 12. Do you have any pilot's license?

A. Yes.

Q. 13. For what water?

A. The Boston district and Cape Henry.

Q. 14. Have you had a license of any kind for the Cape Cod Canal?

A. No, sir.

Q. 15. Have you ever been through the Cape Cod Canal loaded except this time?

A. No, sir.

Q. 16. You had been through there before?

A. Yes, sir.

Q. 17. Twice?

A. Once.

Q. 18. Once. And on that occasion did you receive from them a book of regulations?

A. Yes, sir.

Q. 19. And on that last occasion did you receive a book of regulations?

A. Yes, sir.

Q. 20. Did you look in that book to see what depth of water there was said to be in the canal at mean low water?

A. Yes, sir.

503 Q. 21. What was that depth?

A. Twenty-five feet, sir; mean low water.

Q. 22. And did you know that fact before you took your vessel through the canal on the last occasion?

A. Only by that book.

Q. 23. By that book, I say?

A. By that book; yes, sir.

Q. 24. You had that information before you went there to go through the canal loaded?

A. Yes, sir.

Q. 25. If you had known that there was only, in places, 19 or 20 feet of water, would you have taken your vessel through there loaded?

A. No, sir.

Q. 26. What kind of a vessel was the Bay Port, wooden or steel?

A. Steel.

Q. 27. And she had a balanced rudder?

A. Yes, sir.

Q. 28. What cargo did you have,—you had about 2,393 tons of coal?

A. 2,393 tons of coal; yes, sir.

Q. 29. How was she drafted?

A. 18, 10, aft.

Q. 30. 18, 10, aft?

A. 18, 10, aft; 17, 6, forward.

Q. 31. 17, 6, forward?

A. 17, 6, forward; yes.

Q. 32. That is when she left Norfolk?

A. Leaving Norfolk; yes, sir.

Q. 33. What do you say as to whether that is proper or not?

A. I think so, sir.

Q. 34. You heard Mr. Hart testify that she was 17, 10, forward at Norfolk, and 17, 6, at the canal. What do you say as to that?

A. No, I don't think I heard him; I was out a part of the time,—I don't know as I heard him say.

Q. 35. If he did say that, was he correct in that?

A. I should say not.

Q. 36. Did she draw less forward, or more forward, when she got to the canal than she did at Norfolk?

A. Possibly one or two inches more.

Q. 37. What officers and crew did you have on board when you left Norfolk; did you have a full complement of officers and crew?

A. Full complement; yes, sir.

Q. 38. And whether or not they were licensed men?

A. All licensed; yes, sir; that were required.

504 Q. 39. And in what condition was your vessel when you left as regards seaworthiness?

A. Good condition, sir.

Q. 40. Was she properly fitted out?

A. Yes, sir.

Q. 41. Now, you came to go through the canal. Did anyone order you to do that, or did you use your own judgment?

A. Used my own judgment, sir.

Q. 42. You came to the canal and signaled,—made some signal?

A. Yes, sir.

Q. 43. What signal did you give?

A. For a pilot.

Q. 44. By a whistle?

A. No, sir; by hoisting the letter P.

Q. 45. The letter P. Did you notice any flag set at the canal at that time?

A. They hoisted a flag; yes, sir.

Q. 46. What flag did they hoist?

A. Red flag.

Q. 47. Red flag?

A. Yes, sir.

Q. 48. And did you anchor there?

A. Yes, sir.

Q. 49. How long did you lay at anchor there,—about?

A. About an hour.

Q. 50. What?

A. About an hour.

Q. 51. And then what happened?

A. Then the pilot and towboat came alongside, and we got under way and proceeded.

Q. 52. Was there any change of the red flag before you proceeded?

A. I couldn't say, sir.

Q. 53. You don't know?

A. No, sir. I don't know.

Q. 54. Did you give any orders from the time the towboat and the pilot came there?

A. No, sir; none whatever.

Q. 55. And were you on the bridge?

A. Yes, sir.

Q. 56. Was that above the helmsman?

A. No; alongside of the helmsman.

Q. 57. You were in the wheel-house?

A. In the wheel-house. She has no bridge; we call it a bridge, but it is a pilot-house.

Q. 58. Is there anything over it?

A. Yes, sir; there is an upper bridge, as we call it, but it is just the same as the pilot-house, only it is only made of canvas.

Q. 59. When you started through the canal were you standing in the pilot-house with the helmsman?

A. Yes.

505 Q. 60. Or above?

A. No, sir; in the pilot-house with the helmsman.

Q. 61. Who was at the wheel?

A. Mr. Maker.

Q. 62. Is he a licensed man?

A. Yes, sir.

Q. 63. And what kind of a helmsman did you find him?

A. Good.

Q. 64. Who else was in there with you?

A. The pilot, Mr. Rochester,—Captain Rochester.

Q. 65. After you started did some one come on board and give you a book of regulations?

A. Yes, sir.

Q. 66. Where were you when that was done?

A. I can't designate just the place, but after we got, I think, between Buzzard's Bay bridge and——

Q. 67. Railroad bridge?

A. Railroad bridge and Bourne bridge,—I think so; I am not positive as to that.

Q. 68. And who was that; who did that?

A. I can't say what his name was,—what they call a patrol boat.

Q. 69. Patrol?

A. Yes, sir.

Q. 70. Of the Canal Company?

A. Yes.

Q. 71. And when you entered the canal what was the draft of your vessel forward and aft?

A. 18, 2, and 17, 6, as reported to me.

Q. 72. And was that a proper draft?

A. Yes, sir.

Q. 73. You anticipated, I suppose, that your vessel would have raised by the stern coming up from Norfolk?

A. Oh, yes, sir.

Q. 74. Was the amount that you mentioned about the average that she would raise?

A. Yes, sir.

Q. 75. How did she steer from the time you left Wing's Neck till you got up to the railroad bridge?

A. Very good, sir.

Q. 76. Did she do any sheering to speak of?

A. No, sir, not to speak of; no,—not perceptible.

Q. 77. Was there any difficulty in steering her up to that place?

A. No, sir; none whatever.

Q. 78. Was there any place between Buzzard's Bay bridge and Wing's Neck where she sheered so badly that you thought there was any danger of her turning the tugboat over ahead of her?

A. No, sir.

Q. 79. Now, after coming through the railroad bridge, how did she go along?

A. Very well, sir.

506 Q. 80. The tide at that time was a head tide?

A. Yes, sir.

Q. 81. Under what bell were your engines running?

A. I think under one bell, the full speed bell.

Q. 82. They were run in accord with the pilot's orders?

A. According to the pilot's orders; yes, sir.

Q. 83. About what speed did she make coming through, by the land, do you think?

A. I should say probably about six miles,—six knots.

Q. 84. You did not know the strength of the tide, of course?

A. No, sir.

Q. 85. Now, what was the first that you noticed of anything out of the ordinary in your trip through the canal?

A. Why, nothing until just before we struck.

Q. 86. About how far from where you struck was it that you took the first sheer to port?

A. About four to five lengths.

Q. 87. And that sheer was to port?

A. Yes, sir; slight sheer to port,—very slight.

Q. 88. Did the pilot give any order?

A. I couldn't say.

Q. 89. Did your helmsman change his wheel?

A. I presume he did, sir; I couldn't swear to that.

Q. 90. You don't remember?

A. I don't remember that; no, sir.

Q. 91. And that sheer was broken?

A. Yes, sir.

Q. 92. And when you had broken that sheer, what happened?

A. She began to sheer to starboard towards the south bank.

Q. 93. And about how far from the place where she struck on the south bank was she, do you say, in length?

A. About a length.

Q. 94. And from where she began to sheer to starboard?

A. Yes; a length, possibly a little more, but not much.

Q. 95. A length or a little more?

A. Yes, sir.

Q. 96. Did you notice anything of a so-called "knuckle" at that point?

A. No, sir. I did not.

Q. 97. Did you notice any swirl in the water?

A. Not particularly; no, sir.

Q. 98. What did you think was the reason for her sheering to port and then to starboard?

A. I supposed shoal ground.

507 Q. 99. What made you think that?

A. Well, because vessels usually, when they get near the bottom, take those sudden sheers.

Q. 100. How much water did your vessel need to have under her bottom, to your judgment, to steer properly?

— From five to ten feet; not less than five.

Q. 101. Not less than five?

— Not less than five.

Q. 102. Could you see any other reason for her sheering on that occasion when she sheered, first to port and then to starboard, unless she struck bottom?

A. Unless she struck bottom; no, sir.

Q. 103. You knew nothing about any knuckle or currents or swirls?

A. No, sir, I did not.

Q. 104. Did the helmsman do all he could to break the sheer?

A. Yes, sir.

Q. 105. Did you see anything that the pilot did that was wrong?

A. No, sir.

Q. 106. Did you see anything that the towboat did that was wrong?

A. No, sir.

Q. 107. Now, after you struck that bank, you lay parallel with it?

A. Very nearly so.

Q. 108. Very nearly parallel. And did you sound your pumps?

A. Yes, sir.

Q. 109. What did you find?

A. Didn't find anything at first, when we first sounded.

Q. 110. Didn't find any water when you first sounded?

A. No, not when we first sounded.

Q. 111. What pumps did you have that were working at that time,—ready to work at that time?

A. Well, we have our bilge pumps, so-called bilge pumps; and the same pumps are connected with our water bottoms; they work to the same pump.

Q. 112. Did you have pumps that reached all parts of your vessel?

A. Yes, sir.

Q. 113. And were they in good working order and condition?

A. Yes, sir; so far as I know.

Q. 114. So far as you know. Were they started to work after she began to fill up?

A. Yes, sir.

Q. 115. And did they work?

A. Yes, sir.

508 Q. 116. And did they draw the water?

A. Yes, sir.

Q. 117. How much did they work from that time until she came off, do you know?

A. Well, I couldn't say.

Q. 118. Approximately?

A. I couldn't say. We kept them going constantly, I think, during that day.

Q. 119. Now, the next morning early the diver came there?

A. Yes, sir.

Q. 120. And he went down and found a hole?

A. Yes, sir.

Q. 121. And he plugged that hole?

— Yes, sir.

Q. 122. And then what,—they pumped again?

A. Yes, sir.

Q. 123. After that did your pumps suck?

A. Yes, sir.

Q. 124. Did they suck more than once or only once?

A. Oh, yes, sir; I think we pumped the bilges out dry, you see, first, so they sucked; and then we pumped No. 1 out.

Q. 125. You pumped No. 1 out?

A. Yes, pumped No. 1 out and sucked there, and then we were working on No. 2.

Q. 126. Working on No. 2?

A. Yes, sir.

Q. 127. And you didn't get No. 2 sucked dry?

A. No, sir; but we were gaining on it.

Q. 128. You were gaining on it?

A. Yes, sir, gaining on it.

Q. 129. About how much water was there *it* your vessel at the time she came off?

A. That, I couldn't say.

Q. 130. Can you give any idea?

A. In sounding, of course, we sounded 22 feet, but that is not a correct sounding at that time, because the water was forced up through the pipe—small pipe, you know,—the water was forced through the pipe; and then she was laying over on her side somewhat, and that, of course, gave her not a true sounding there. All I go by is the water in the forepeak.

Q. 131. In the forepeak?

A. Yes.

Q. 132. What was the depth of your hold?

A. I think it was 24 feet or somewhere in that neighborhood.

Q. 133. Twenty-four feet?

A. I think it is; I don't know the exact—

Q. 134. You don't remember?

A. No, sir; I don't know; I never measured it.

509 Q. 135. You speak about the water in the forepeak. Where was the forepeak,—in the very forward part of the vessel?

A. Well, no; the forward bulkhead,—the cargo bulkhead,—what I call the "peak," the cargo bulkhead.

Q. 136. And what was the depth of the cargo in that forepeak?

A. Might have been 6 or 7 feet.

Q. 137. And what did you say, if anything, in reference to the water in that compartment?

A. The water was over the coal a little, that is all.

Q. 138. Had that been pumped out?

A. No, sir; that was in the cargo hold.

Q. 139. What?

A. That was in the cargo hold. We depended on that draining down into the bilges for the water to get out.

Q. 140. That was draining through into the bilges?

A. Yes,—drains through into the bilges.

Q. 141. And would then be pumped out?

A. Yes, sir.

Q. 142. But it had not drained through at the time she came off?

A. No, sir.

Q. 143. Where were you when the vessel came off?

A. I was standing about at No. 3 or 4 hatch, about that place, on the starboard side.

Q. 144. How did she come off? Just describe it.

A. Just slid off, that was all.

Q. 145. Slid off sideways?

A. No, sir; slid right straight ahead.

Q. 146. Directly straight ahead?

A. Straight ahead; yes, sir.

Q. 147. You did not notice any sideways movement?

A. No, sir.

Q. 148. The current was then with you?

A. Yes, sir.

Q. 149. And she floated off, went off with the current?

A. Yes, sir.

Q. 150. Did you hear anything said by anyone at the time she came off,—by Captain Joe Lewis or Captain William Lewis?

A. I can't say that I can remember anything more than——

Q. 151. You were on the deck of your vessel?

A. Yes, sir; at that time.

Q. 152. Who was with you?

A. Why, I was alone at the time when she first started.

510 Q. 153. Where was pilot Lewis at the time?

A. He was aft, sir, near the poop.

Q. 154. On your vessel?

A. Yes, sir.

Q. 155. And what did you do?

A. Started for the bridge.

Q. 156. Did you go fast or slow?

A. Went pretty fast, sir.

Q. 157. When you got there, where was pilot Lewis?

A. He was up on the bridge, sir.

Q. 158. He got there before you did?

A. Yes, sir.

Q. 159. Did you give any orders?

A. No, sir.

Q. 160. Who did?

A. Mr. Lewis.

Q. 161. That is, pilot Lewis?

A. Pilot Lewis; yes, sir.

Q. 162. So far as you saw, were the orders he gave correct ones?

A. Yes, sir.

Q. 163. Were his orders that he gave from that time to those on your boat obeyed?

A. I think they was, sir, as far as I could see.

Q. 164. Could you see the helmsman who went to the wheel after you came off?

A. Yes.

Q. 165. Who was it?

A. Mr. Maker.

Q. 166. The same man?

A. Yes, sir.

Q. 167. And the Dalzelline went ahead of you?

A. Yes, sir.

Q. 168. After she came off and the Dalzelline went ahead, how did the Bay Port proceed?

A. She proceeded all right for a time.

Q. 169. And how was she as to being by the head when she came off?

A. Well, I presume she might have been 18 inches; I am not positive of that, of course; I can't tell only judging by my eye.

Q. 170. How did she handle in the first half mile?

A. Handled first rate, sir.

Q. 171. How did she steer?

A. Steered all right.

Q. 172. And did she steer as well as she had the day before, or was she logier?

A. She might have been a little logier; I couldn't say as to that.

Q. 173. A little logier?

A. Might have been a little logier, but steered all right.

Q. 174. Did you have any difficulty in steering her during the first half mile or so?

A. No, sir; none.

Q. 175. When was the first time there was any difficulty in steering her after she came off?

A. About abreast of the Trilby or near the Trilby. I can't locate it just exactly, but right near the Trilby.

Q. 176. And then what happened?

A. She took a sheer there to the south bank again, towards the ferry house.

Q. 177. And then after that what happened?

A. Then we broke that sheer; and then she again sheered to port, which we never broke.

Q. 178. And then she sheered to port?

A. Yes, sir.

Q. 179. Were you able to break the second sheer to port?

A. No, sir.

Q. 180. And she struck on the north bank?

A. Yes.

Q. 181. And then her stern came out, and she sank?

A. Swung against the south bank and sunk.

Q. 182. What, in your opinion, was the reason for her sheering to starboard and port, towards the south bank and north bank, on that occasion?

Mr. Pillsbury: The same objection that I made to the other.

A. Shoal water; that is the only thing that I could tell.

Q. 183. Did the helmsman do everything he could to break the sheers?

A. Yes, sir; done just what he was told.

Q. 184. Were all orders of the pilot obeyed that you know of?

A. Yes, sir.

Q. 185. If there had been 25 feet of water at mean low water in

that locality, do you think that vessel would have sheered the way she did?

A. I don't think she would.

Q. 186. You don't think she would?

A. No, sir.

Q. 187. Thinking, as you did, that there was 25 feet of water at mean low water, after you came off, in your judgment, was it proper to continue and go through the canal?

A. Yes, sir.

Q. 188. If you had known that there was a shoal spot showing from 19 to 20 feet that you had got to go over, would you have thought it advisable to go out?

A. I should have left it to the pilot's judgment.

Mr. Pillsbury: That is not what he was asked.

Q. 189. What was your judgment?

A. My judgment?

512 Q. 190. What would have been your judgment if you had known there was only 18 to 20 feet of water?

A. To go on.

Q. 191. Even though there had been that depth of water?

A. Yes,—nothing else to do.

Q. 192. Nothing else to do. In your judgment, was it safe or practical to have attempted to tie up in the canal at those dolphins that you passed by at that time?

A. Whether it would have been practical, I wouldn't say.

Q. 193. You wouldn't say?

A. I wouldn't say.

Q. 194. After the accident, she sank and stayed there?

A. Yes, sir.

Q. 195. And you stayed around down there for some time?

A. Yes, sir.

Q. 196. Did you ever have any conversation with the mate of one of the tugs after the accident, in which he said something about his steering gear at one time having giving out?

A. No, sir.

Q. 197. And you said to him that that was the trouble with your "old tub," or something of that kind?

A. I don't recollect anything of the kind.

Q. 198. Did you have any trouble with your steering gear?

A. None whatever.

Q. 199. What did you have,—steam steering gear?

A. Steam steering gear; yes, sir.

Q. 200. And was it in good working order and condition?

A. Yes, sir.

Q. 201. All the time?

A. All the time I was there; yes, sir.

Q. 202. I show you a photograph, captain, and ask you if you recognize the Bay Port in that position?

A. Yes, sir.

Q. 203. Was that when she was finally aground and sunk?

A. Yes, sir.

Q. 204. And she struck the first time on the other side of the canal?

A. Yes, sir.

Q. 205. And backed in this direction?

A. No; she struck over on the north bank.

Q. 206. On the north bank?

513 A. And her stern swung around and caught the south bank and held there; and the bow swung around, and the tide cut her right around in the position where she is.

Q. 207. Can you mark with a pencil which side she struck on?

A. On this side [indicating]. Shall I mark it?

Q. 208. Yes, mark it with a pencil.

[The witness marks the place.]

Q. 209. Where you put that arrow?

A. Yes, sir.

Q. 210. On that side?

A. On this side; yes, sir.

Q. 211. And then her stern swung over?

A. Yes, sir.

Q. 212. And she finally landed over on the other side?

A. Yes, sir. I can't say that is the spot where she struck, but this is the side.

Q. 213. I understand you were not familiar with the canal to know the location of the spots, etc?

A. No, sir.

Q. 214. You don't know what the tide was running down there at all?

A. No, sir; I don't know the strength of the tide.

Q. 215. Were your engines run at the same speed all the time so far as you knew?

A. So far as I know.

Q. 216. Now, before the second accident I understand you were where; were you then on top of this pilot-house?

A. Yes, sir, on top of the pilot-house.

Q. 217. On top of it?

A. Yes, sir.

Q. 218. Did you see the Hazleton come up to you at any time before she struck the second time?

A. I did see her approaching; yes, sir.

Q. 219. Approaching you?

A. Yes, sir.

Q. 220. Your pilot bridge was near the after part of your vessel?

A. Yes, sir, she is near the after part.

Q. 221. How far from the after end of your vessel?

A. Oh, she is about fifty feet probably.

Q. 222. Were any men aft of you?

A. I couldn't tell you if they were. They were underneath the deck, you understand, so I couldn't see them. There is two decks

there, you know; there is a cover that covers the house, and then another deck.

Q. 223. Did the Hazleton get up abreast of you at any time before the second accident, that you saw?

514 A. I can't say particularly; I don't know whether she did or not; I was looking straight ahead all the time, and I didn't take much notice.

Q. 224. But she did not get up as far as where you were, anyway?

A. No, sir,—no.

Q. 225. Did you see her attempt to offer any hawser to your vessel at any time?

A. No, sir, I couldn't say I did.

Q. 226. Are you a coast pilot now?

A. Yes, sir.

Q. 227. Can you give me the time of the first stranding?

A. The time of the first stranding?

Q. 228. The time of day.

A. Yes, sir; 2.15, I believe.

Q. 229. And the time when she came off was what, in the morning?

A. She came off at ten o'clock, I think; about ten o'clock.

Q. 230. And struck at what time, about?

A. Well—

Q. 231. Shortly after?

A. Shortly after. I have never kept run of that.

Q. 232. She went three-quarters of a mile or so?

A. About three-quarters of a mile; yes, sir.

Q. 233. Did you remain at the canal after the accident for some days?

A. Yes, sir.

Q. 234. And did you go to the place about where you first struck?

A. Yes, sir.

Q. 235. Did you at that time see where this knuckle was?

A. No, sir; not at that time.

Q. 236. Did you learn at that time in reference to the shoal spot that was just to the west of that?

A. Yes, sir.

Mr. Pillsbury: Learn in what way? Do you mean somebody told him?

Q. 237. How did you learn about the shoal spot back to the westward of where you first struck?

A. Why, by conversation with the men that were digging there.

Q. 238. There was a dredge put in there afterwards?

A. Yes, sir.

Q. 239. Something has been said in the pleadings about not having a siphon hole in your vessel. You did, as I understand you, have all your pumps that were required?

A. Yes, sir.

515 Q. 240. Did you have any place in your vessel for a siphon to be put in?

A. No, sir.

Q. 241. Did you ever know of any vessel of that character having such a place?

A. No, sir; none whatever.

Q. 242. Can you give us the location of the Trilby,—where the Trilby was,—that digger near which you said you sheered to port and then to starboard?

A. She was just west of the Bournedale ferry.

Q. 243. Just west of the Bournedale ferry?

A. Yes, just west of the Bournedale ferry; I think about half way from where we struck, or perhaps a little more, towards the ferry,—where we first struck,—where we first sunk.

Q. 244. And you struck the second time just after passing the Bournedale ferry?

A. Yes, sir.

Q. 245. Have you ever tried to steer one of these pigs when they were by the head, except on this occasion?

A. Yes, sir; we have them by the head quite often.

Q. 246. And how do they steer by the head?

A. As well by the head as any other way, I guess; I never saw much difference.

Q. 247. Except in the open ocean,—except in rough water?

A. Yes, sir.

Mr. Pillsbury: I think you are leading him rather too much.

Mr. Blodgett: Perhaps so.

Q. 248. How does she steer except in rough water? In smooth water how does she steer?

A. Steers all right.

Q. 249. From your experience does it make any difference in the steering whether it is a pig or whether it is the ordinary cargo carrier, with a sharp stem, for sheering or steering when they are by the head?

A. I think a pig would steer better than a sharp stem vessel.

Q. 250. The Bay Port, I understood you said, steered all right?

A. Yes, sir.

Q. 251. All the time?

A. Yes, sir.

Q. 252. Except for these sheers?

A. Sure.

516 Cross-examination.

(By Mr. Pillsbury:)

X Q. 253. On the trip before when the Bay Port went through the canal, what was her voyage; where was she coming from and where was she going to?

A. We went to—well, I don't know whether we went to Newport News or Norfolk, but we loaded at either one or the other place, and from there to Providence on the first trip.

X Q. 254. You came up loaded with her?

A. Yes, sir.

X Q. 255. Did you go through the canal with her loaded?

A. No, sir.

X Q. 256. What had been the custom in handling her when loaded as to whether or not you would take her through the canal?

A. I don't understand that question.

X Q. 257. Did she ever go through the canal, loaded, before this trip?

A. Not while I was aboard of her.

X Q. 258. How long were you aboard of her?

A. I was there—I took charge, I think, on the 23d of November. And she has made one round trip and back to the canal.

X Q. 259. One round trip. How long had you been in the service of this company?

A. Well, I had been third mate of the ship; I had been also mate of the ship previous.

X Q. 260. Of the Bay Port?

A. Yes.

X Q. 261. Then you had been attached to the ship, although not as master, before this trip?

A. Yes, sir.

X Q. 262. When were you attached to the ship; how long had you been with the ship in some capacity or other at the time of this trip?

A. I think about three or four months; I am not positive; I can't tell you just now, I haven't got the data, but some three or four months.

X Q. 263. And where had she been running during that period; what voyages did she make?

A. Various places; New Bedford, Boston and Lynn.

X Q. 264. How many times did she go through the canal in that period?

A. She never went through the canal in that period.

X Q. 265. Well, she went through the canal once before
517 you took her through on this occasion, did she not, light?

A. Yes, sir; but that was some time afterwards, after I had been with her—another man as master, not myself.

X Q. 266. You were on board?

A. Yes, I went through with her, light, the first trip previous.

X Q. 267. Were you on board at any other time that she went through?

A. No, sir.

X Q. 268. That was previous to your being on board, that she had been through before?

A. Yes, sir.

X Q. 269. What sailing orders do you have as to the course that you shall follow in going from one point to another?

A. I don't understand that question.

X Q. 270. Well, you knew when you went through this canal

with the ship loaded, that it had not been customary to take her through the canal loaded, did you not?

A. I had orders to use that canal if I saw fit.

X Q. 271. Whether loaded or light?

A. Loaded or light.

X Q. 272. That was left entirely to your discretion?

A. Yes, sir.

X Q. 273. You thought that on this occasion you would take her through loaded?

A. Yes, sir.

X Q. 274. Although you had not done it before?

A. No, sir.

X Q. 275. Was there any occasion at this time more than any other time to take her through when she was loaded?

A. Well, I wanted to shorten the distance; I wanted to get to Boston quick.

X Q. 276. To Weymouth, was it not?

A. Yes, sir, to Weymouth.

X Q. 277. Had you had a rather hard passage up there?

A. Well, we just had a little hard passage the night before, previous, coming from New York.

X Q. 278. You had had pretty rough weather?

A. Quite rough that night; yes, sir.

X Q. 279. Was that the reason you wanted to go through the canal?

A. Well, no, sir; not particularly that.

X Q. 280. When did you decide to go through the canal?

A. After we got into Vineyard Sound.

X Q. 281. And what was the reason that you decided to
518 go through?

A. Because I thought that I would be in Boston before night; and if I went around the other way I wouldn't get here until the next morning.

X Q. 282. Did you talk that matter over with your mate?

A. I think probably I did; I can't say.

X Q. 283. Your mate had been master of this ship before you were master, had he not?

A. No, sir,—oh, yes, he had,—yes, I think he had.

X Q. 284. And how long had he been on the ship?

A. I couldn't tell you. He had been on there,—I couldn't tell you: I don't know; he had been on there two or three different times, I think.

X Q. 285. What did he say when you talked over the matter of going through the canal?

A. Never said anything that I know of.

X Q. 286. Well, didn't you say you talked it over with him?

A. I say I don't know whether I did; I might have.

X Q. 287. Don't you remember about it?

A. No, sir, I do not; I have no distinct recollection of ever having any talk with him; still, I might have.

X Q. 288. Will you say, captain, he did not advise you not to go through?

A. I don't know whether he did or not.

X Q. 289. You won't say that he did not advise you not to go through?

A. No, I won't say he did not, or I won't say he did. If he did, I wouldn't have paid any attention to it one way or the other. I considered I was master of my own ship, not to be dictated to by anybody.

X Q. 290. Well, you talked it over with him?

A. I wouldn't say that I did; I don't think I did,—I don't know that I did; I might have; I am likely to talk almost anything over with him in the course of the voyage; I am talking lots of things that I can't remember.

X Q. 291. Are you willing, captain, once more to say that he did not advise you against going through the canal?

A. Not to my knowledge.

X Q. 292. You do not recall it?

A. No, sir, I do not.

519 X Q. 293. When you signaled for the pilot, you say the red flag was flying?

A. They hoisted the red flag; yes.

X Q. 294. What does the red flag mean?

A. Danger, I believe, the way I understand it,—that the canal was closed.

X Q. 295. The canal was closed because of what?

A. Well that I don't know; I presume that the canal was not open for traffic. As I understand, it is a one way canal, and that there was something coming through,—which I found out there was.

X Q. 296. That is what the red flag means, is it not?

A. I believe so; yes, sir.

X Q. 297. A block signal, is it not, practically?

A. Yes, sir, a block signal practically,—a block signal; yes, sir.

X Q. 298. And they fly that red flag when there is something in the canal coming through?

A. Yes, sir.

X Q. 299. And when the canal is free, they fly a white flag?

A. Yes, a white flag,—yes, sir; I believe that is it.

X Q. 300. You do not recall about this white flag?

A. No, sir.

X Q. 301. But on the other occasion you went through you remember they flew a white flag to show the canal was free?

A. Yes,—I don't remember it—

X Q. 302. Well, you understood what the white flag meant?

A. Yes, I understood that by the book of directions.

X Q. 303. The white flag meant that the canal was now free?

A. Yes, sir.

Mr. Blodgett: To go through, it means, according to the directions.

X Q. 304. Did you make a report to your owners of this accident?

A. I never made any written report.

X Q. 305. You did not make any?

A. No, sir.

X Q. 306. How many times did she sheer the first day before she struck?

A. I don't know of her sheering at all.

X Q. 307. Before she struck?

A. No, sir, only just before she struck.

X Q. 308. That is, she made the one sheer and struck?

A. She made two sheers, one a little to port and then the one to starboard.

520 X Q. 309. Was the sheer to port of any consequence?

A. Not very much,—very slight.

X Q. 310. Was it of any consequence at all?

A. What say?

X Q. 311. Was it of any consequence?

A. Why, a little; you could call it of consequence or not, just as you like.

X Q. 312. I want your idea.

A. I say I don't know; it was very little; I couldn't say whether it was 2 feet or 4 feet,—it was a little sheer.

X Q. 313. Little sheer?

A. Yes, sir.

X Q. 314. In comparison with the other sheer, it was of no particular consequence?

A. No particular consequence, I should say.

X Q. 315. Now, you say when she took the sheer resulting in the striking she began to sheer about—the beginning of the sheer was about a length before she struck the bank?

A. Yes, sir, about a length; possibly a little more.

X Q. 316. You were with the ship, of course, all the time after she struck?

A. Yes, sir.

X Q. 317. And up to the time she sank?

A. Yes, sir.

X Q. 318. How long did you remain around the canal?

A. Until January 23d.

X Q. 319. This was December 14 that the accident happened?

A. 13.

X Q. 320. 13. And she sank on the 14th, and you stayed there all that time?

A. Yes, sir.

X Q. 321. What were you doing all of that time?

A. Taking observations of what was going on in regard to the ship.

X Q. 322. And of course you saw the localities of these accidents many times during that period, did you not?

A. Yes, sir, I saw them.

X Q. 323. What is that?

A. Yes, sir, I did see them; I don't say that I saw them many times; I might have seen them two or three times.

X Q. 324. Did you, during any of the time that you saw the scenes of the accidents, notice any so-called knuckle to which you attached any particular importance?

A. No, sir, I did not.

X Q. 325. And did you notice any unusual current at the
521 scene of either of the accidents?

A. That depended on the tide. Sometimes there was none, sometimes there was a great deal.

X Q. 326. That was true as to the canal in general, was it not?

A. I think so; yes, sir.

X Q. 327. Did you yourself make any soundings at the scene there,—at the scene of the accident?

A. I did not, sir.

X Q. 328. Or see any made?

A. No, sir.

X Q. 329. When was the dredge set at work at the shoal that you have spoken of to the westward of the first striking?

A. I have some data if it is allowed to be used.

Mr. Blodgett: You can use it to refresh your recollection,—use anything to refresh your recollection.

Mr. Pillsbury: Certainly; I shall be very glad to have you.

A. [Producing a memorandum book.] I think I have it here. I am not positive now as to that, I think I have. [After looking at the book.] I don't know as I have it; I don't think I began on this one until later. I don't think I have it here.

X Q. 330. Have you any note at all about the dredging there or when you talked with these men that you have testified about?

A. I may have it here somewhere. I don't think I have the time when they were put on, or anything of that kind.

X Q. 331. I want you to refer to any note that you have of any talk with anybody dredging there.

A. Wait one moment, sir, please.

X Q. 332. Look at your notes on January 5.

A. Yes, sir; I am just coming to it now,—January 5, yes.

X Q. 333. What are your notes for January 5?

A. Well, I just put it in here,—“Three dredges”—that is, on January 5—“Three dredges at work deepening the canal at different points; one just west of Buzzards Bay bridge,—that is, the dredge Admiral, being a suction dredge; a dredge just west of Bournedale ferry, at or near where the Bay Port struck the first obstruction.” That is all there is there. I don't speak of the other one, because the other one was at work there when we were there.

X Q. 334. Was either of those points near the scene of the striking on December 13?

A. Yes, sir; the one,—the Kennebec was very near where we took the first sheer.

522 X Q. 335. Which one is that which you have described by the notes?

A. This is the Kennebec,—I spoke of the Kennebec.

X Q. 336. Where did you mark it on your notes?

A. January 5.

X Q. 337. Yes, but where?

A. It says—

X Q. 338. Where was it at work?

A. Just west of where she struck first.

X Q. 339. No; what do your notes say?

A. What say?

X Q. 340. What do your notes say?

A. It says "Three dredges at work deepening the canal at different points; one just west of Buzzards Bay bridge. This is the dredge Admiral, being a suction dredge; and a dredge just west of Bournedale ferry"—oh, yes,—“at or near where Bay Port struck the first obstruction”—yes, that was the Trilby; that was the one that was at work there. That is east.

X Q. 341. That was the one where she struck or before she struck the second day, is it not?

A. Oh, yes.

X Q. 342. I am talking about any dredge, or notes in relation to any dredge, that was dredging near the scene where she struck first?

A. That would be the Kennebec. I don't know whether I have it in here or not.

X Q. 343. You haven't any note of it, have you?

A. I don't know whether I have or not.

X Q. 344. Just look. I want you to be sure about that. See if you have any note of any dredging going on anywhere near the place that she struck the first day.

A. Yes; on January 6, I have it, but I didn't give the name of the digger.

X Q. 345. What is your note for January 6?

A. It says: "At 3 p. m. took auto and went to wreck; took some snap-shots of wreck and mud digger and place where Bay Port first struck."

X Q. 346. "Took snapshots of mud digger and place where Bay Port first struck"?

A. Yes, sir.

X Q. 347. Let us see the snapshot of the mud digger, will you, please?

A. [Reading.] "Mud digger at work west of the Bournedale Ferry, named Kennebec."

X Q. 348. That was west of the Bournedale ferry?

A. Yes, sir.

523 X Q. 349. Now, that is the Trilby, is it not; that is the place where the Trilby was working, is it not?

A. I think that the Trilby at that time had been taken away.

X Q. 350. And this substituted for it?

A. No; this one was—I think this one,—I don't know whether I made these notes just clear or not; I only marked them down just for my own benefit; I didn't suppose they were going to be used in any way, and I think this was intended to be the Kennebec, because it says Kennebec and "dredge people working west of where the Bay

Port first struck." The Trilby was working east, and they took her away for some reason.

X Q. 351. You mentioned two that were in relation to Bournedale ferry?

A. Yes, I said west of the Bournedale ferry. I won't be positive about that, because I took snapshots of both of them.

X Q. 352. Is not the shoal west of the Bournedale ferry the shoal where the Trilby had been previously working?

A. Yes, that is one shoal she had been working on previously,—that the Trilby was working on.

X Q. 353. So that the shoal we have been talking about in connection with the second day, is it not?

A. What is that?

X Q. 354. That was nearer the scene of the second accident than the first, was it not,—this Bournedale ferry shoal?

A. Yes, just a little nearer,—yes, sir.

X Q. 355. And that is where the Trilby had been working?

A. Yes, sir.

X Q. 356. Now, I want to ask you again if you have any notes of any dredging operations near the place where she first struck?

A. I don't know whether I have or not,—whether I have of that particular place. I speak of the Kennebec in here, so I presume that was the one. Of course, that would be west of the Bournedale ferry just the same. January 6—[looking again at the memorandum book previously referred to]. I don't know as I have anything here further.

X Q. 357. That is, the only notes you made and the only photograph you took was of this shoal which we have been talking about in connection with the second day; isn't that true?

524 A. No; I took a picture of the other one, the other dredge,—the dredge Kennebec, working west.

X Q. 358. That is, your note you say relates to the shoal in relation to the second day,—that the Kennebec was working where the Trilby had formerly worked?

A. I don't say that it worked on that shoal. It says "west of Bournedale Ferry", and either one of them was west of Bournedale ferry.

X Q. 359. How far west was it?

A. I don't know whether—this Kennebec,—I speak of the Kennebec, and she was not working at that shoal that was close to Bournedale; she never worked at that shoal at all.

X Q. 360. Where was she working?

A. She was working up where she first struck,—where we first struck, west of the point where we first struck, the Kennebec was; and the Trilby working on the other shoal near the Bournedale ferry. Now, this note speaks of the Kennebec.

X Q. 361. What does it say about the Kennebec?

A. Well, it don't say,—the only note I make of the Kennebec says: "The mud digger at work west of Bournedale Ferry, named Kennebec." But that was after the Trilby was taken away.

X Q. 362. Exactly, and she was working in the same place where the Trilby had been working?

A. No, sir, she was not,—I beg your pardon, sir,—she was not.

X Q. 363. What was the date of that entry?

A. January 6.

X Q. 364. January 6?

A. Yes, sir.

X Q. 365. Now, that was the time you say that you learned about the existence of a shoal?

A. Oh, no, I don't know whether that was just the time I learned about the existence of the shoal,—I didn't know anything about any shoals until after the diggers were there, except where the Trilby was working; that is, I knew that she was digging out some shoals, and she was digging there when we first struck,—the Trilby.

X Q. 366. You went by her, did you not, the second day?

A. Yes, sir.

X Q. 367. She was working there and had been working there some time?

A. Yes, sir.

525 X Q. 368. Was this the first time you knew of the existence of any other shoal,—January 6?

A. No; I can't say just when I learned of the existence of any other shoal.

X Q. 369. How did you learn of the existence of any other shoal?

A. By observing the diggers. I asked the men what they were digging, and they said "Shoals."

X Q. 370. Exactly. Had you made any investigation up to that time to find out if there were any shoals anywhere around there?

A. No, sir; none whatever.

X Q. 371. Made no inquiries in relation to it?

A. No, sir; just in a general way talked with men,—that is the only way I found out; I never made any particular investigation myself by sounding or any other way.

X Q. 372. When the ship came off Lewis was not on the bridge, was he,—William Lewis?

A. No, sir, he was not on the bridge.

X Q. 373. Did you hear anyone shout "She is afloat", anything of that sort?

A. Yes, sir, I did.

X Q. 374. Whom did you hear?

A. I think it was my cook, the first man that observed the ship moving.

X Q. 375. When you got on the bridge, as we will call it,—you say there isn't really a bridge, but what you call a bridge——

A. What we call the bridge.

X Q. 376. When you got there, William Lewis was there, was he?

A. Yes, sir.

X Q. 377. Did you see him go up?

A. Yes, sir; I followed him, right close to him.

X Q. 378. You both arrived at about the same time?

A. Yes, both practically at about the same time; yes.

X Q. 379. What was the first thing that he said to you or you said to him?

A. I couldn't tell you; I couldn't remember; I have no idea.

X Q. 380. You can't recall anything that passed between you?

A. Nothing particular. I don't think there was anything particular said; I don't know of anything at all whatever that was said; I don't know what the first thing was that was said; I couldn't recall it to save my life.

X Q. 381. What was the first thing you did after you got on the bridge?

A. I didn't do anything.

X Q. 382. You just stood there?

A. Just stood there; yes sir.

X Q. 383. What was the first thing you observed him doing?

A. The first,—he didn't do anything except to tell me to ring up full speed ahead.

X Q. 384. He told you to ring full speed ahead?

A. Yes, sir.

X Q. 385. Where was the boat at that time?

A. She might have been once her length from where she struck, possibly.

X Q. 386. How far out from the shore?

A. She had drifted out a little, just clear.

X Q. 387. Did you do what he said?

A. Exactly; yes, sir.

X Q. 388. Did you think that was the right thing to do?

A. I think so, sir.

X Q. 389. Do you still think so?

A. Yes, sir.

X Q. 390. Where were the tugs when that order was given?

A. Well, one tug was attempting to get hold of the lighter to take her away. The other tug was turning around to get a line on to her bow.

X Q. 391. Which tug was trying to get the lighter away?

A. The Stuart.

X Q. 392. Where was the Stuart when the boat went off?

A. I think that she had a line out to the steamer and was laying partially on to the lighter. I am not positive; I think she was, but I wouldn't be positive as to that.

X Q. 393. You think she was fastened to the steamer?

A. Yes, on the port side of the steamer; I think she had a line out to the steamer, laying partially on to the lighter, on the outside. I think so; I am not positive as to that.

X Q. 394. In relation to the steamer, where was the lighter?

A. The lighter was laying alongside of the *Pay Port*, on the port side, about amidships; possibly a little forward of it.

X Q. 395. And the Stuart was outside of the lighter?

527 A. Yes, sir; I think she was partially,—I think she lapped on the lighter, if I remember right.

X Q. 396. Wasn't she tied to the lighter?

A. She might have been; I don't know, sir.

X Q. 397. I show you this photograph, captain, and ask you if that represented the position of the Stuart at the time the boat went off?

A. I couldn't tell you; I don't know when that was taken, sir.

X Q. 398. I know you don't, but does that correspond to your recollection of the situation?

A. I should think so, about that. I am not positive about that; I can't tell exactly.

X Q. 399. Now, the lighter was between the Stuart and the Bay Port, was it not?

A. Yes, sir.

X Q. 400. Does the lighter show there at all?

A. Yes, sir; I think it shows between them; yes, sir; yes, this is the lighter's mast.

X Q. 401. That is the lighter's mast, is it, there?

A. Yes, sir.

X Q. 402. And the Hazelton appears there?

A. They laid on bow; yes, sir; heading to the westward.

X Q. 403. The other tug I don't suppose appears here, does it?

A. I don't think it does; I don't think I see only one tug.

[The photograph is shown to the Court.]

The Court: I have seen that.

Mr. Pillsbury: Has that one been put in before?

Mr. Blodgett: I don't think *think* that one has.

The Court: No.

Mr. Blodgett: This photograph [referring to another photograph] has not been marked.

[The photograph referred to by Mr. Blodgett is marked as "Bay Port Exhibit 14," and the photograph shown to the witness by Mr. Pillsbury is marked as "Canal Company Exhibit 21."]

X Q. 404. Did you hear any orders to the captain of the Stuart as to what to do?

A. I couldn't recall any orders that was given to the Stuart.

X Q. 405. Do you recall any orders given by Joseph Lewis?

A. I don't think there was only one order that I heard,—that was: "The ship is up to you, Captain Lewis."

528 X Q. 406. You heard him say to Captain Lewis: "The ship is up to you, Captain Lewis"?

A. Yes, "the ship is up to you, Captain Lewis."

X Q. 407. What reply did you hear Captain Lewis make?

A. I didn't hear any reply at all; I don't know as he replied to him.

The Court: You mean pilot Lewis?

The Witness: Yes, sir, pilot Lewis.

X Q. 408. Was anything said as to tying up at Sandwich, do you remember?

A. I don't know as there was. I think that that was generally understood that that was where she was to go if she floated; that she was to tie up at Sandwich.

X Q. 409. Well understood by whom?

A. Why, generally understood. I think that was talked over,

that if she floated, why, I would take her down and tie her up at Sandwich.

X Q. 410. When was that talked?

A. I think it was talked—might have been the night before, or that day; I can't say; I just remember some conversation in regard to that matter, in that line.

X Q. 411. With whom?

A. Why, with Captain Lewis and the pilot and I guess myself,—I don't know but Mr. Gardner. The talk was all general; I couldn't specify exactly just when or who was there.

X Q. 412. I wish you would try to, captain, because we want to get that if possible. Was Joseph Lewis there?

A. Yes, sir.

X Q. 413. Tell us the talk.

A. I can't tell you the talk because I can't remember it; I can't remember it word for word,—I can only in a general way.

X Q. 414. Just tell us the substance of it.

A. I was just telling the substance of it, I think.

X Q. 415. Tell us it again.

A. I am telling you that I think it was talked over that she was to be tied up there so as to stop the leak so we could proceed to Boston; that was a proper and safe place for her to stay.

Mr. Blodgett: Tied up where?

Mr. Pillsbury: At Sandwich.

The Witness: At Sandwich; yes, sir.

529 X Q. 416. And who suggested that that was the way to handle her?

A. That I couldn't say.

X Q. 417. Did you?

A. No, sir; I didn't suggest anything at all whatever; I had nothing to do with it.

X Q. 418. Did William Lewis?

A. I can't say anybody did, sir.

X Q. 419. Did Joseph Lewis?

A. I can't say positively whether it was him or not; I think likely it was Captain Lewis,—I think likely it was.

X Q. 420. Well, you see we have got two Lewises.

A. Well, I understand you are speaking of Captain Joe Lewis and Captain William Lewis,—yes, Captain William Lewis was the pilot; he would have been the man to have done it if it had been done.

X Q. 421. You do not recall who made the suggestion that she should be tied up at Sandwich?

A. No, I do not particularly.

X Q. 422. Did that seem to you to be the proper thing to do?

A. I think so; yes, sir.

X Q. 423. In the event of her floating she was to be tied up at Sandwich?

A. I think so; yes, sir,—that was the general impression.

X Q. 424. Now will you tell me the position of the Dalzelline at

the time she went off? The position of the Hazelton appears in that photograph, and that is in accordance with your memory?

A. Yes, I think they were both at the bow of the steamer, "heads and points" as we call it; they were heading to the westward, the steamer headed to the eastward,—hanging on a line,—single line, I think.

X Q. 425. When the signal was given "Full speed ahead"—was that the signal "Full speed ahead?"

A. Yes, sir; one bell is always "Full speed ahead."

X Q. 426. And she was put full speed ahead?

A. Yes, sir; as far as I know. I was not in the engine room, but I presume she was.

X Q. 427. Did you see any of the tugs trying to get a line to her or assist her?

A. The Dalzelline most assuredly; he put a line to the bow immediately.

X Q. 428. What about the Hazelton?

530 A. Well, the Hazelton—I don't know where she went to; I don't remember. She cast adrift and went out into the canal, and what she done I don't know; I don't know where she went to after that. I think she was the one that tried to go and get hold of our stern; I think she is the one.

X Q. 429. You saw her trying to get up to your stern, did you?

A. The Stuart had to take the lighter, and of course she had to take care of him,—of the lighter. And that left the Hazelton to do the other work.

X Q. 430. The Stuart did not attempt to do anything with you at all?

A. She had no chance.

X Q. 431. She had her hands full with the lighter?

A. Yes, sir.

X Q. 432. Now, you say the Hazelton attempted to get up to your stern and give you a line?

A. I think she did, sir; yes, sir.

X Q. 433. Why didn't you let her do that; wouldn't she have been of some assistance?

A. I didn't stop her, or try to stop her.

X Q. 434. Then I will put another question: Why was she not able to do that?

A. That I couldn't tell you.

X Q. 435. You started off full speed, with the current, did you?

A. Yes, sir.

X Q. 436. And were you leaving her?

A. No, sir; I don't think so; we were not going fast enough to leave her.

X Q. 437. How fast were you going?

A. Well, I couldn't say. We didn't go very fast at first, because the engines had been laying cold for 24 hours, and they had to be worked a little bit at first.

X Q. 438. Tell us how fast she went at first?

A. I suppose she would have been going three or four miles an hour,—three or four knots, we will call it.

Mr. Blodgett: Over the land, or through the water.

The Witness: Through the water.

X Q. 439. And you had a current of how much?

A. I suppose two to three knots,—three and a half, something like that,—not over three and a half anyway.

X Q. 440. How long did you continue with your engines full speed ahead?

A. That I can't say, because I only gave the bells as Captain Lewis ordered me, and I don't know whether he—just when he ordered me, or whether we stopped at all or not until we went full speed astern just before striking.

X Q. 441. You do not recall?

A. No, I do not recall any change of the speed—

X Q. 442. You do not recall any change of the speed until you went astern, do you?

A. I don't recall any change. There might have been, but I don't recall it.

X Q. 443. Did Captain Lewis give any orders which you did not think were proper?

A. No, sir.

X Q. 444. You approved of everything that he did?

A. Yes, sir.

X Q. 445. Captain, would it have been possible to have held the boat in the deep water when she came off, with the aid of the tugs or otherwise, before starting down the canal?

A. I think it might have been if we had wanted to.

X Q. 446. That could have been done if you had wanted to do it, could it not?

A. If we had wanted to do it, probably.

X Q. 447. Don't you think that would have been a good idea?

A. No, I don't think so.

X Q. 448. You don't think so?

A. No.

X Q. 449. You think that she was in proper condition to navigate the canal?

A. She handled for a time all right.

X Q. 450. How was her trim when she came off the bank?

A. Why, she had a list to port.—a port list, about fifteen inches, perhaps, something like that; and she was down by the head some.

X Q. 451. How much would water in the forepeak which was over the cargo be likely to put her down at the head?

A. Not any.

X Q. 452. It would not affect it?

A. No, not perceptibly; you couldn't tell the difference,—what water was over the cargo.

X Q. 453. Did you hear one of the witnesses this morning say she wouldn't even float off if the water was over her cargo?

A. No, I did not. Over her cargo?

X Q. 454. Yes.

A. Oh, there wasn't any cargo in that fore-hatch of any amount.

X Q. 455. How many feet?

A. About four or five feet.

X Q. 456. Four or five feet?

A. Yes.

532 X Q. 457. And the water was over that, was it?

A. Just over it; yes; might have been a foot or so over that.

X Q. 458. A foot or so over that?

A. Yes, sir.

X Q. 459. How big was that hatch?

A. Well, that hatch was—I did know just exactly. I know it was big enough to put a digger in. I did know just the exact measurements of that, but I can't recall just now. I suppose about 12 feet square, or else it was 12 foot one way and 9 the other, I forget just exactly. I think there was a little difference one way; they were a little longer one way than they were the other; they were not perfectly square,—I don't doubt but what they were nearly square, but they were big enough for a digger, ordinary size digger.

X Q. 460. Was there any other water in the ship besides there?

A. I presume there was,—not in sight.

X Q. 461. Where was it?

A. Well, it was in the water bottoms,—there was water in the water bottoms.

X Q. 462. In the cargo holds?

A. Must have been some in the cargo holds if it was up in the forepeak.

X Q. 463. You think the water in the forepeak would not put her down at the head?

A. Not to amount to anything.

X Q. 464. She was down at the head, was she not?

A. Yes, sir, she was down at the head.

X Q. 465. What did put her down at the head?

A. Well, the wet cargo and the water together.

X Q. 466. Then the water did help put her down at the head, did it not?

A. Yes; but what was over the top of the coal didn't make much difference. You were speaking about the water that was on top of the coal, not the water that was in the coal.

X Q. 467. I don't think I made that distinction.

A. I thought you did; that is the way I understood.

X Q. 468. It would have to be in the coal if it was on top of it.

A. Then I will withdraw my statement about what you said. That is the way I understood it,—water over the coal.

X Q. 469. There would not be water over the coal unless there was water in the coal.

533 A. Yes,—but the water that was over the coal didn't amount to much. The water in the coal of course would amount to quite a good deal.

X Q. 470. Then let me ask you this question, captain: Did the water that was in the compartment where the coal was have any effect on her trim?

A. Why, yes; it would naturally put her down by the head.

X Q. 471. Put her down by the head?

A. Some; yes.

X Q. 472. Now, the water that was in that compartment was over a cargo a foot, you say?

A. Yes. You must remember it was all one compartment, the whole length of the ship.

X Q. 473. Yes.

A. Yes.

X Q. 474. Now, how much would that water put her down?

A. I couldn't tell you. I claim about 18 inches,—my guess; that is the only way I have any way of knowing, just guessing at that.

X Q. 475. You couldn't see?

A. Oh, I could tell by the marks, but I had no time to look at the marks to see how she was trimmed after she went off. I was up on the bridge.

X Q. 476. But you were not doing anything, were you, captain?

A. Sir.

X Q. 476a. You were not doing anything?

A. Yes, sir; I was there to strike the bells.

X Q. 477. Well, if you had considered any of the orders that William Lewis gave as being improper orders, would you have carried them out?

A. No, sir; I would have just called his attention to it and let him reverse them if he saw fit.

X Q. 478. You would have called his attention to the fact that they were not the right order?

A. Yes.

X Q. 479. Suppose, for instance, you had thought, yourself, that it was unwise to attempt to go down the canal in the condition the ship was in,—that it would be better to lie there until you got the water out,—and he gave an order "Full speed ahead with the engines," would you have executed that order?

A. No, sir,—why, "Full speed ahead"? Yes, I should have executed the order just as he gave it to me.

X Q. 480. Even though you thought it an improper one?

A. I should have executed the order as he gave it to me.

534 X Q. 481. Even though you thought it was an improper order?

A. I didn't think it was improper; I wouldn't have thought it was improper at any time.

X Q. 482. If you had thought it was improper, you would have executed it, would you?

A. No, sir; I should have asked him if he thought it was proper; I should have called his attention to it and told him I thought it was improper.

X Q. 483. Now, suppose he had said, after you called his attention

to it: "Why, yes, I think that is a proper order; I think the ship is in good condition"—

Mr. Blodgett: Is there any contention that there was an improper order given by pilot Lewis?

Mr. Pillsbury: Well, I will make my contentions when I come to my argument.

The Court: I think you are wasting a good deal of time spinning your hypotheses, but you may go ahead.

Mr. Pillsbury: I do not want to if your Honor thinks that.

The Court: What is the use of spending time in asking how much the water would put her down when he was there and saw it?

Mr. Pillsbury: I understand he was on the vessel and couldn't see the marks.

X Q. 484. Could you see how much she was down at the head?

A. Only just by the general outline and the appearance of the vessel.

The Court: Let us not thresh over that old straw. I simply meant that as a typical instance of what I regard as a waste of time.

X Q. 485. Now, when she went aground the second time, how far did she go after the sheer begun and before she hit the bank?

A. I should say she began to sheer about at the ferry; she struck about 1,500 feet to the east of the ferry,—oh, she didn't strike 1,500 feet,—she struck I should judge about 500 feet or 600 feet somewhere east of the ferry,—where she struck.

X Q. 486. Now, how far did she go after the sheer began before she struck,—the sheer that resulted in her striking?

A. Oh, three or four times her length.

X Q. 487. Was that a rank sheer?

A. Yes, sir.

535 X Q. 488. Did she go further on that sheer before she struck than she did the day before?

A. I think she did a little; yes.

X Q. 489. What?

A. Yes, sir, I think she did.

X Q. 490. How much?

A. I think she did, because she was further over on the side of the canal then,—she was away over on the south side of the canal when she took that sheer,—pretty well over on the south bank; she was on the southern side of the centre of the canal, which would allow her more distance.

X Q. 491. You know the canal is only 100 feet wide?

A. I understand so; yes, sir.

X Q. 492. Having that in mind, do you think she started the sheer three or four times her length before she hit?

A. Yes, sir, I think so.

X Q. 493. I am not speaking of the first sheer, but of the sheer when she hit.

A. Yes.

X Q. 494. You still think so?

A. Yes, I think it was about three or four times her length.

X Q. 495. Now, when you talked it over as to taking her to Sandwich and tying her up there, was it the understanding that the Scott Company should go to Sandwich and do the work?

A. No, sir, I have no knowledge about it.

Mr. Park: I object to that.

The Court: He says he has no knowledge about it.

(By Mr. Park:)

X Q. 496. Captain, did you expect that any of the cargo of the ship would have to be taken out before she would come off?

A. We did expect to; yes, sir.

X Q. 497. Did you notice the Stuart giving water to the Salvor off on the port side of your ship?

A. I did not; no, sir.

X Q. 498. And you did not see her after she had furnished water to the Salvor move further down on the port quarter of your ship?

A. No, sir, I never noticed that.

The Court: How did Captain Lewis come aboard of your ship? That has not been explained. How did he happen to be there?

The Witness: That, I couldn't say, your Honor. I called up the agents of the vessels and told them she was ashore, by telephone; and they said: "Very well, we will send for Captain Lewis."

536 The Court: That was Captain Joe Lewis?

The Witness: That was Captain Joe Lewis.

The Court: I mean Captain William Lewis. I mean, how did pilot Lewis happen to go aboard?

The Witness: Oh, pilot Lewis? That, I couldn't tell you, sir, I have no idea. All I know is, he was there, he came there in the morning, early morning.

The Court: Why were you turning over the command of your vessel to him, if you don't know why he was there?

The Witness: Well, I presume he was there to pilot the ship, of course; what I mean is, he was there to pilot the ship, of course.

The Court: No, it is not "of course" at all. You have got to show me why he was there to pilot the ship. That is just what I want to know.

The Witness: Well, Captain Rochester was the first pilot.

The Court: Yes.

The Witness: And he was sent on some other job; and I presumed that they sent pilot Lewis in his place.

The Court: I don't care what you presumed. I want to know what happened. The fact was, that pilot William Lewis showed up aboard of your vessel?

The Witness: Yes, sir.

The Court: Thereupon, you turn the command of the vessel over to him when she goes afloat?

The Witness: Yes, sir; as he is pilot of the canal, sir, and I was not; I was not pilot and he was a pilot.

The Court: I see.

The Witness: He was a canal pilot.

Redirect examination.

(By Mr. Blodgett:)

Q. 499. When did he show up on your vessel?

A. Some time in the morning; I can't tell you just the exact hour.

Q. 500. Did he say anything to you as to who he was or what he was when he came?

A. No,—I knew who he was pretty well,—he was a pilot.

Q. 501. You knew he was a pilot?

A. Yes, sir.

537 Q. 502. You were asked something in reference to the lighter Trilby. You saw her there, did you,—the lighter Trilby,—before you went through, after the first accident, on the second morning? Had you seen her at the time of the first accident,—the lighter Trilby?

A. No, sir; not at the first accident,—no, sir; I hadn't seen her.

Q. 503. At the time you slid off, had you seen her?

A. Yes, sir; I could see her from where the vessel lay; and I passed right by her when I went down to the ferry to telephone that we had struck.

Q. 504. That is, after the first accident?

A. No; that is at the time—

Q. 505. After you were ashore the first time?

A. After I was ashore the first time?

Q. 506. Yes.

A. Wait a moment.

Q. 507. After you struck the first time, when you went down the shore to telephone, you saw her?

A. Yes, sir; I saw her,—yes, sir; that is right.

Q. 508. You say you expect there was some talk about tying up at Sandwich?

A. Yes, sir.

Q. 509. That meant to go through the canal to the Sandwich end?

A. Yes, sir; the way I understood it.

Q. 510. Now, in your direct examination you said that your boat made, on the first day, about six knots. Did you mean over the ground, or through the water?

A. Through the water.

Q. 511. Through the water,—that is what I understood you before. Now, you were asked in reference to your notes and seeing dredges at work while you were there afterwards?

A. Yes, sir.

Mr. Blodgett: I want to offer this statement from the company's records:

"The lighter Trilby worked between stations 192 and 191 at Sagamore Beach between the thirteenth and twenty-fifth inclusive and between stations 192 and 193 from November 27 to December 16. The barge Kennebec worked at station 242 on December 28, 29, 30, January 1st and 2d, and took out about 1,350 yards during that time. The Federal worked from December 30 to January 3 between stations 401 and 401.50."

538 Mr. Pillsbury: I suppose that is correct. Will you let Mr. Mahony check it up?

Mr. Blodgett: Yes; check it up. There is one other question I want to ask.

Mr. Pillsbury: I am told that that is correct so far as it goes; but it does not include the date that his note relates to, namely, the 6th; and it appears from this record that the Kennebec was not working at that time where he says she was. Let us amplify the statement.

Mr. Blodgett: Amplify the statement to whatever the facts are.

Q. 512. Now, you were shown "Canal Company Exhibit 21", and I see two men,—the photograph of two men on the deck of your vessel?

A. Yes, sir.

Q. 513. Do you know who they are?

A. Yes, sir.

Q. 514. Who?

A. Captain William Lewis and myself.

Q. 515. Which is you?

A. This one [indicating].

Q. 516. The one on the right, as you are looking at the photograph?

A. Yes, sir.

Q. 517. And Captain William Lewis is on the left?

A. Yes, sir.

Mr. Blodgett: That is all. I will offer this other matter when we get it.

The Court: If I understand you, Captain Hammett, you and William Lewis and Joseph Lewis had had a talk somewhere or other, where it had been discussed what was to be done after the vessel came off,—is that right?

The Witness: I think that is right, yes,—in a general way.

The Court: And it was considered that the best thing to do was to take her right through to Sandwich?

The Witness: Yes, because we wanted to get her where there wasn't any rip-rap,—I think that was a place where there was a sandy bottom; and in case we had to land her on the bottom, it was a sandy place to lay and the widest part of the canal.

Mr. Pillsbury: May I ask just one more question in that connection?

539 Recross-examination.

(By Mr. Pillsbury:)

X Q. 518. That arrangement was made having in mind that she would be pumped out before she came off?

A. I couldn't say so, because I don't know,—that was not brought up,—that never was mentioned.

X Q. 519. It was assumed that you were going to have her pumped out before that?

A. I presume so.

X Q. 520. And she came off before you expected her to?

A. Why, she came off,—yes, before we expected her to,—sure.

Mr. Pillsbury: That is all.

LOUIS H. TIMMANS (sworn).

(By Mr. Park:)

Q. 1. Captain Timmans, what is your full name?

A. Louis H. Timmans.

Q. 2. You reside where?

A. New York City.

Q. 3. What is your business?

A. Submarine diver and wrecking master for the insurance companies.

Q. 4. How long have you been engaged in wrecking and salvage operations?

A. Since 1874.

Q. 5. Did you leave a wreck to come here?

A. Yes, sir; Atlantic City.

Q. 6. Do you know the Cape Cod Canal, so called; have you been there?

A. I have been down to the Cape Cod Canal.

Q. 7. Have you seen the locality where the Bay Port first struck?

A. Yes; I had it shown to me down there.

Q. 8. Captain, the Bay Port went on to the south bank of the canal in the afternoon, at about high water, December 13, 1916. She is a whaleback, and she had 2,300 or 2,400 tons of coal. Shortly after high water three tugboats attempted to pull her off. She was lying about parallel to the beach. They were unsuccessful. The following morning a diver found a leak, four by eight inches, in her starboard bilge and plugged it up. The pumps had commenced to gain on the water, and at about ten o'clock, at half tide, she came off. Now, as a professional man, if you had been down there, in order to get that vessel from that bank, the banks being sloping, what would have been the modus operandi,—what would have been your
540 mode of procedure in order to get her off,—protect the ship and get her off into deep water?

A. I should say, from my experience travelling around in that line of business, and especially in a place where a vessel had gone

ashore and landed on to rocks which had punctured her and liable to do so again, the main thing would be to get her out of there, take her away from there,—the minute she goes ashore, take her away. Sometimes they use anchors to do that.

Q. 9. Would you have got out anchors and chains on the shore and made her fast to the shore?

A. Not unless I didn't have any property around me, so that that would be the next best thing to do. If I had property around me—and, in fact, I would have that property around me when I started,—have the right pumps, and I would have my tugboats around me, if I had control of it, so that when I got ready to pump my boat I could take care of her in any condition she might be in rather than leave her on the beach.

Q. 10. In other words, the object would be to get her off the bank as soon as you can?

A. Yes, for the reason that, the tide rising or falling, she might punch another hole.

Q. 11. Captain, if the tugs were unsuccessful in getting her off on the afternoon of the 13th, would you have thought that she would have come off without taking out a part of that cargo?

A. It wouldn't be natural to think so.

Q. 12. You say it would not be?

A. No, sir. I would have sent for some other gear if I could have got it; or if I had it there, I would have begun work right away.

Q. 13. I understand from what you say you would have gotten her into the deep water of the canal just as soon as you could?

A. Yes; naturally that is where boats go; they want to get afloat; they don't want to get on the beach.

Q. 14. When she got into the water of the canal, why, the tugs would take care of her?

A. Be sure to have enough of them to take care of her.

Q. 15. She had fires under her boilers and she had steam to use on the engines; could they be made use of if necessary?

A. As I understand it, she was heading with the current.

541 Q. 16. Heading with the current.

A. That would leave her engines, so to speak, not really having all control of her. The tugboats should have been right there to take care,—the three tugboats,—to take care of her. She could go with the stream, and these three tugboats would have held her in position where she couldn't drift ashore.

Q. 17. That is, I understand you to say the three tugboats should be in a position to do anything they wanted to do,—stop or go ahead?

A. Yes, sir; providing that was best for her.

Cross-examination.

(By Mr. Pillsbury:)

X Q. 18. Assume, captain, that this boat was a whaleback and that she was practically full of water, had enough water in her to cover the coal in the forward compartment, and that when she came off she was

down at the head, say, 18 inches or so and had a list; would you have thought that the tugs should have got around her and taken care of her until the water could have been pumped out, or that she should start at once under full speed down the canal?

A. With the current, I would have thought that these tugboats, when they had got possession of her, would have,—between her own engine and the three tugboats,—would have got control of her.

X Q. 19. Whether she was half full of water or not?

A. As long as she floated, with a fair chance, we believe in getting them off the rocks.

X Q. 20. Do you think she ought to have waited until the tugs had got around her so they could help her before she started down with the current?

A. That is a pretty hard thing for me to decide on only what I saw down there. I didn't see sufficient at the time. I see the tide one time there, looking at that situation, and I have seen the steamer, but I didn't see them in that position. It is a pretty hard thing for me to decide that.

X Q. 21. After she had come off, what do you think should have been the first thing to do to protect her?

A. The first thing to have done was to get her anchored, if she couldn't proceed through, where she could be held, where she wouldn't get on the rocks again, because the tide is rising and falling in the canal.

542 X Q. 22. Would it have been possible for the three tugs to hold her in deep water?

A. It seems to me so, indefinitely.

X Q. 23. They could have held her there indefinitely?

A. Yes, sir.

X Q. 24. Especially with the assistance of her own engines?

A. With the assistance of her own engines.

Mr. Pillsbury: That is all, captain.

Mr. Park: That is all, captain.

ALEXANDER M. SHELTON (sworn:)

(By Mr. Blodgett:)

Q. 1. What is your name, captain?

A. Alexander M. Shelton.

Q. 2. How old are you?

A. Thirty years old.

Q. 3. Where do you live?

A. Atlantic, Mass.

Q. 4. What is your occupation?

A. Master mariner.

Q. 5. And how long have you been a master mariner?

A. Two years, sir.

Q. 6. What was your occupation prior to that time?

A. Why, as an officer of a ship.

Q. 7. As first mate?

- A. First, second and third mate for the past five years.
- Q. 8. How long have you been to sea?
- A. Twelve years, sir.
- Q. 9. In what kind of vessels?
- A. Sail and steam.
- Q. 10. How long have you been in steam?
- A. Seven years.
- Q. 11. On the coast?
- A. On the coast; some offshore in sail vessels.
- Q. 12. But steam on the coast?
- A. Yes, sir.
- Q. 13. Any colliers?
- A. Yes, sir.
- Q. 14. How long have you been familiar with pig vessels?
- A. Three years, sir.
- Q. 15. Have you been on them continuously for three years?
- A. Yes, sir.
- Q. 16. What vessels?
- A. Bay State, Bay Port and Bay View.
- Q. 17. What vessel are you now connected with?
- A. Steamer St. Paul, sir.
- 543 Q. 18. How long have you been with her?
- A. Only a matter of two months, sir.
- Q. 19. She is owned by whom?
- A. The Shipping Board controls her now, sir.
- Q. 20. The Shipping Board controls her. What officer are you on her?
- A. Second officer, sir.
- Q. 21. Now, in December, 1916, were you one of the crew of the Bay Port?
- A. Yes; I was mate of her.
- Q. 22. Mate of her. Did you have a master's license at that time?
- A. Master's license at that time.
- Q. 23. Master's license. Did you have charge of the loading of the vessel at Norfolk?
- A. Yes, sir.
- Q. 24. Just tell us what cargo went into her and how she was loaded?
- A. Two thousand three hundred and ninety-three, sir.
- Q. 25. Tons?
- A. Yes, sir. Eighteen feet, 10, aft; 17 feet, 6, forward.
- Q. 26. From your experience, what do you say as to that method of loading?
- A. Good trim, sir.
- Q. 27. How much would she ordinarily lighten up aft in coming up to the canal?
- A. Seven inches, sir.
- Q. 28. How much?
- A. Seven inches her stern would come up.
- Q. 29. Do you know as a matter of fact what she did draw when you got to the canal?

- A. Eighteen, 2, sir.
- Q. 30. And how much forward?
- A. Seventeen, 8.
- Q. 31. How did the vessel steer as she came up?
- A. Very good, sir.
- Q. 32. She had a balanced rudder?
- A. Yes, sir.
- Q. 33. And how does a vessel steer with a balanced rudder; do they handle more quickly than with an ocean rudder?
- A. More quickly.
- Q. 34. They handle quicker?
- A. Yes, sir.
- Q. 35. She had steam steering gear?
- A. Yes, sir.
- Q. 36. What kind of condition was that in?
- A. Very good.
- Q. 37. Now, you got to the canal and anchored for about an hour, and then a tugboat came down?
- A. Yes, sir.
- Q. 38. And the pilot came aboard?
- A. Yes, sir.
- 544 Q. 39. Did you see any flag set by the Canal Company?
- A. I don't remember, sir.
- Q. 40. A white or red flag?
- A. I don't remember.
- Q. 41. Had you ever been through the canal before in one of these loaded vessels?
- A. Yes, sir; twice,—not in any loaded vessel.
- Q. 42. Not in a loaded vessel?
- A. No, sir.
- Q. 43. You had been through twice before in an unloaded vessel?
- A. Yes, sir.
- Q. 44. In a light vessel?
- A. Yes, sir.
- Q. 45. You had no license for the canal?
- A. No, sir.
- Q. 46. Nor a government license for the canal waters?
- A. No, sir.
- Q. 47. After the tugboat and pilot came, where did you go?
- A. I hove up the anchor, sir.
- Q. 48. The anchor forward?
- A. Forward; yes, sir.
- Q. 49. Did you stay there all the time?
- A. No, sir; I come back aft and was walking the deck in front of the wheelhouse.
- Q. 50. What was the condition of the vessel as she went along up the canal that day?
- A. Good.
- Q. 51. The towboat towed you ahead properly? Was the towboat properly handled, so far as you could see?
- A. Yes, sir.

Q. 52. Could you see the helmsman?

A. Why, no, sir; I could see his face, but that was all. I was on the outside of the wheelhouse.

Q. 53. What did you notice as you went along up after you go through the railroad bridge,—what did you notice in reference to the steering of the vessel, how she handled?

A. Well, she went very good, sir, until we got up about a mile this side of the ferry, to the westward of the ferry, when she took a light sheer to the north shore. Then she took another sheer to the starboard shore, to the south shore; she went on a distance of three lengths, probably, and she ran ashore and stopped.

Q. 54. About how far was she when she took the sheer to port from the place where she commenced to sheer to starboard?

A. About a matter of three lengths, sir.

Q. 55. Then from when she commenced to sheer to starboard until she struck, about how far was it?

A. I thought that was the question you just asked me, sir.

Q. 56. No; the first question was, from the time she took her sheer to port until she commenced to take her sheer to starboard.

A. I don't remember, sir; it was only a short matter of time.

Q. 57. And your judgment is that from the time she commenced to sheer to starboard she was about three lengths from the place where she struck?

A. Yes, sir.

Q. 58. Did she strike hard, or how?

A. Well, quite hard.

Q. 59. And she stayed right there?

A. Stopped; yes, sir.

Q. 60. Now, after she struck, what did you do?

A. I was taking a sounding rod and sounding the tank, sir.

[Adjourned to 10 a. m., Tuesday, March 26, 1918.]

Boston, Mass., March 26, 1918.

Mr. Pillsbury: If your Honor please, I was asked to produce Mr. Geer's letter of resignation and I said I did not have it. I have since found it and I want that fact to appear on the record. I do not think it is admissible, but I do not want the record to show that I did not have it when we have since found it.

Mr. Blodgett: The judge ruled that it was not admissible.

The Court: No, I did not make that ruling in reference to a paper called for by the other side and produced.

Mr. Pillsbury: They have not inspected it, and I shall not offer unless they do.

The Court: Very well.

Mr. Blodgett: I won't object.

Q. 61. Just at the adjournment the last time I had asked you what you were doing just after she struck the first time. You said you had taken a sounding rod and were sounding the tank?

A. Yes, sir.

Q. 62. What tank?

A. No. 2, sir.

Q. 63. What did you find?

A. I found about eight inches of water.

Q. 64. Did you sound any other tanks?

A. Yes, sir; I sounded all of them.

Q. 65. What did you find in the others?

A. Dry, sir.

546 Q. 66. What did you do after that?

A. Give orders to the engineer to start the pumps, sir.

Q. 67. And were they started?

A. Yes, sir.

Q. 68. What pumps were started?

A. The ballast tank, sir,—wrecking pump.

Q. 69. How large a pump is that?

A. About an eight-inch suction.

Q. 70. Eight-inch suction?

A. Yes, sir.

Q. 71. Where did it go on your vessel?

A. To all parts, sir, of the bottom and all those tanks.

Q. 72. All those tanks?

A. Yes, sir.

Q. 73. Did you at any time go forward to the forepeak while she was there?

A. Yes, sir.

Q. 74. Did you have any cargo in what I call the "forepeak"?

A. Yes, in the forward hold,—yes.

Q. 75. In the forward hold. About how much was the depth of cargo in the forward hold of the vessel?

A. Against the forward bulkhead, sir, there was about four or five feet, I should say, from the bottom of the ship.

Q. 76. Did the water come up so you could see it over that cargo at any time?

A. It did that night; yes, sir.

Q. 77. And in the morning was it pumped down at all?

A. Yes, sir.

Q. 78. When you came off, about how much water was there in there?

A. Well, I should say—

Q. 79. Was it up to the top of that coal, or below it, then, as near as you can remember?

A. Well, I don't remember, sir. There was a little water,—I could see a little water on the port side, in one corner; I wouldn't say it was over six inches,—about six inches.

Q. 80. The vessel canted to port?

A. A little; yes, sir.

Q. 81. So that side was a little the lowest?

A. A little the lowest.

Q. 82. And there was about six inches of water on the port side?

A. On the port side.

Q. 83. Over the top of the coal on the port side?

A. Over the top of the coal on the port side.

547 Q. 84. On the starboard side and in the centre, was the coal dry, or was there water over it?

A. Dry, sir.

Q. 85. Dry. And the coal at that point in the vessel, you say, was about four or five feet deep?

A. Four or five feet deep.

Q. 86. Where were you standing when she came off?

A. I was forward, sir.

Q. 87. Did you stay forward?

A. Yes, sir.

Q. 88. Did you see pilot Lewis?

A. Yes, sir.

Q. 89. Where did you see him?

A. He was standing aft on deck, sir.

Q. 90. On your vessel?

A. Yes, sir.

Q. 91. Where did he go?

A. Sir?

Q. 92. Where did he go?

A. He went to the bridge.

The Court: When was this?

Mr. Blodgett: When the vessel came off.

The Court: Yes. I didn't get that. Yes.

Q. 93. Who went to the bridge with him?

A. Captain Hammett.

Q. 94. After she came off did a tug go ahead of her?

A. Yes, sir.

Q. 95. On a short hawser?

A. About 30 fathom, I should say.

Q. 96. Thirty fathom. And your vessel went ahead?

A. Yes, sir.

Q. 97. Now, how did she go along as she started?

A. Very well, sir.

Q. 98. Was she by the head or by the stern at that time?

A. I should say she was a foot by the head.

Q. 99. How near the head of your vessel were you standing as you went along?

A. Oh, about 30 feet, sir.

Q. 100. Were you keeping watch, or what were you doing?

A. I was standing, watching there, sir, that is all.

Q. 101. How did your vessel follow the tug?

A. Very good.

Q. 102. As to sheering,—did she sheer?

A. Yes, sir; just before she got down to the ferry.

Q. 103. Until she got down to where the lighter Trilby was, did you notice any sheering?

A. Not before then; no, sir.

Q. 104. And the Trilby was down not far from the ferry?

A. Pretty close to the ferry; yes.

Q. 105. Pretty close to the ferry. What did you notice in
548 reference to the ship sheering when you were alongside of the
Trilby?

A. Well, she took a sheer to the south side first.

Q. 106. Toward the ferry?

A. Towards the ferry; yes.

Q. 107. How close did she come to the ferry on that sheer?

A. Well, she come fairly close; I don't remember just the distance.

Q. 108. Well, you were standing right there?

A. Yes, sir, I was standing right there.

Q. 109. As you recall it, how close did she come to it?

A. I should say 40 feet; somewhere there; she came pretty close
to it.

Q. 110. Then what did she do?

A. She took a sheer to the port, sir.

Q. 111. Sheered to the north bank?

A. Yes, sir, to the north bank.

Q. 112. Was the sheer to the north bank ever broken?

A. No, sir.

Q. 113. That is the one she struck on?

A. Yes, sir.

Q. 114. How far was it from the point where she sheered toward
he north bank until she struck the bank?

A. From the time she took the port sheer until she struck the
bank?

Q. 115. Yes.

A. I should say a matter of about three lengths, sir.

Q. 116. The tide was with you at the time?

A. Yes, sir.

Q. 117. She struck on her port bow?

A. Yes, sir, on the port bow.

Q. 118. Then what happened?

A. She backed off, sir, good, and her stern went over on the south
side, and she sank there with her head nearly in the middle of the
canal.

Q. 119. When she struck the second time, was she parallel or
nearly parallel with the canal, or at an angle to it? This is the sec-
ond time I am speaking of.

A. Well, she was at an angle to the canal, sir.

Q. 120. She was still on the sheer when she struck?

A. Still on the sheer.

Q. 121. When she struck the first time how was she with reference
to the canal?

A. Parallel, sir, with the canal.

Q. 122. Had the sheer been broken before she struck?

A. The first time?

549 Q. 123. Yes. Had she stopped her sheering to the south
bank?

A. Yes, sir; when she struck I think she was about stopped.

Q. 124. But she had not got back into the canal?

A. No, sir, she hadn't got back into the canal.

Q. 125. From the time she came off and started her engines, with the tug ahead of her, until she got down to the Trilby, had you noticed any difference in the way she handled that morning than she had the day before?

A. No, sir.

Q. 126. Have you ever steered that boat?

A. Yes, sir; a good many times.

Q. 127. How did she steer?

A. Very good.

Q. 128. In smooth water how did she handle?

A. Good.

Q. 129. Did you ever dock here without a tugboat?

A. Yes, sir.

Q. 130. And did you ever take her in narrow rivers or streams—

A. Yes, sir.

Q. 131. —without a tugboat?

A. Yes, sir.

Q. 132. And under those circumstances how did she handle?

A. Very good.

Q. 133. In your judgment, what caused her to sheer on the first day?

Mr. Pillsbury: The same objection I made before.

The Court: Yes. I will allow that.

A. I should say shoal water, sir.

Q. 134. And, in your judgment, what caused her to sheer on the second day?

A. Shoal water.

Q. 135. If there had been 25 feet mean depth of water, in your judgment would either accident have happened?

A. I don't think so.

Q. 136. Had you ever been through the canal before in a deep loaded vessel?

A. No, sir; never.

Q. 137. You had been through light?

A. Light; yes, sir.

Q. 138. You had been through twice, had you, light,—going west?

A. Yes, sir, going west.

Q. 139. Those were the only occasions?

A. Only occasions; yes, sir.

Q. 140. Was Captain Lewis on the bridge with your captain all the time from the time she came off until she finally sank?

A. Yes, sir.

Mr. Park: Which Lewis?

Q. 141. Captain William Lewis?

A. Captain William Lewis.

Q. 142. Pilot Lewis?

A. Pilot Lewis.

Q. 143. Captain Joe Lewis was never on your boat while she was moving?

A. Not while she was moving; no, sir.

Q. 144. Did you have any knowledge of any shoal spots in the canal?

A. No, sir.

Q. 145. You heard something said by one of the witnesses in reference to the fact that shortly after the accident you said something to him to the effect that you had told your captain that your vessel ought not to go in the canal?

A. No, sir, I never said that.

Q. 146. Did you make any such statement?

A. No such statement.

Q. 147. Did you ever make any such statement to anyone?

A. No, sir.

Q. 148. About how fast was your vessel going on the first day, at the time you struck or at the time you sheered?

A. About five or six knots, sir.

Q. 149. Was that over the ground?

A. Through the water.

Q. 150. On the first day, I am talking about.

A. Well, I mean that is through the water about five or six knots—over the ground; yes.

Q. 151. Over the ground?

A. On the first time; yes.

Q. 152. On the second day, after you came off and got started, at the time when she got down by the Trilby and sheered to the north bank, how fast do you think you were going?

A. Do you mean through the water, or over the ground?

Q. 153. Through the water, first.

A. Why, I should say about three knots.

Q. 154. And over the ground?

A. A matter of five or six, probably.

Q. 155. Five or six. Did you receive any orders during that time from Captain Hammett?

A. No, sir.

551 Q. 156. You were not near enough to hear who gave the bells or see who gave the bells—

A. No, sir.

Q. 157. —or hear what was said on the bridge?

A. No, sir; I heard nothing.

Q. 158. You are the man who kept the log-book?

A. Yes, sir.

Mr. Blodgett: And that log-book, I want it to appear on the record, has been called for and produced and inspected by the other side.

Q. 159. On which side of the Bay Port did you leave the Trilby as you passed it?

A. Starboard side.

Q. 160. How close to her did you go, do you think?

A. I should say a matter of 50 feet, sir; about that; I don't remember just how far.

Q. 161. Now, I think I asked you this Friday, but I am not sure: When the Bay Port started into the canal how was she trimmed?

A. Very good.

Q. 162. Trimmed how?

A. She was trimmed very good, sir.

Q. 163. She was trimmed somewhat by the stern?

A. By the stern; yes, sir.

Q. 164. And in the condition she was trimmed, how had she always handled in smooth water?

A. Good.

Q. 165. On the first day, as I understand you, you had the current against you?

A. Yes, sir.

Q. 166. And the speed of your vessel was about five or six knots, you say?

A. About five or six knots.

Q. 167. Was that in addition to the current, or was the speed of the vessel herself about five or six knots through the water?

A. That was the speed of the vessel herself.

Q. 168. So that the current was deducted from that?

A. Deducted from that; yes, sir.

Cross-examination:

(By Mr. Pillsbury:)

X Q. 169. I don't believe I quite understand that. Do you mean she was going over the ground at that speed the first day?

A. No; I mean she was going about six knots over the ground,—yes, sir—no, sir; against the current.

552 X Q. 170. That is, through the water?

A. Through the water; yes.

X Q. 171. Well, now, how fast was she going over the ground; in other words, how strong was the current?

A. I couldn't say that, sir. I should say the current was somewhere about three knots.

X Q. 172. About three knots?

A. Yes, sir.

X Q. 173. So that would leave it either two or three knots over the ground?

A. Yes, sir; somewhere thereabouts, I should say.

X Q. 174. You had been master of this ship before this voyage, had you not?

A. Yes, sir.

X Q. 175. And how long had you been master of her before this voyage?

A. Only one trip, sir.

X Q. 176. Was that the previous trip before the one in question?

A. No; that was some time last May that I was master of her.

X Q. 177. In the May previous?

A. Yes, sir.

X Q. 178. And did Captain Hammett succeed you?

A. No, sir.

X Q. 179. Who did succeed you?

A. Captain Dunton, I think.

X Q. 180. Were you first mate under him?

A. No, sir; I left the ship.

X Q. 181. You left the ship as soon as you ceased to be master of her?

A. Yes, sir.

X Q. 182. And then returned to her the trip previous to the one in question?

A. Yes, sir, the trip previous to the one in question,—yes.

X Q. 183. Now, at the time you were master of her, how long had you been on her?

A. I don't remember. I had been on her three or four different times; but I think I had been on that time about three months; three or four months, I think, sir.

X Q. 184. Had you been through the canal with her?

A. Yes, I went through the canal once, not when I was master, though.

X Q. 185. When you were master you did not go through?

A. No, sir.

X Q. 186. Either light or loaded?

A. Neither light or loaded; no, sir.

X Q. 187. Did you have any trouble navigating the canal when you went through light?

A. No, sir; none whatever.

553 X Q. 188. Was that in the daytime?

A. Yes, sir.

X Q. 189. On both the occasions before this?

A. Yes, sir.

X Q. 190. Did you notice any condition where this so-called knuckle has been described which was unusual on either of those trips?

A. No, sir.

X Q. 191. You said in answer to Mr. Blodgett that you thought the cause of her sheering both the first day and the second day, and all the sheers that she took, was shoal water?

A. It seems that way, sir, the way the ship took the sheer.

X Q. 192. You do not know of your own knowledge that there was shoal water there, do you?

A. No, sir; I couldn't say; I didn't sound it.

X Q. 193. Now, let me assume, Mr. Shelton, simply for the sake of the argument, that there was no shoal water when she sheered, that she had plenty of water underneath her; what would you say was the cause of the sheer?

A. I should say she never would have sheered, sir, if there was not shoal water.

X Q. 194. You cannot conceive of her sheering for any other reason?

A. No other reason, unless there is shoal water or current; I couldn't say which.

X Q. 195. Now, you have spoken of current. Would current account for her sheering?

A. I suppose a current, taken on the bow, sir, would do it, sir.

X Q. 196. Have you known of her sheering in a current?

A. No, sir.

X Q. 197. Have you known of any ship sheering in a current?

A. Not to any extent; no, sir.

X Q. 198. Well, do you think this boat would sheer in a current?

A. Well, it stands to reason, if a current gets on the ship's bow, it will drive her either one way or the other, sir,—a strong current. That is all I know about it.

X Q. 199. Would that be especially true, Mr. Shelton, if she were rounding a turn at the time?

A. No, sir; I don't think there is much of a turn there; I don't remember much about a turn.

X Q. 200. I am asking you, whether there was or not, to
554 suppose there were a turn,—suppose she were rounding a turn, would that make her more likely to sheer?

A. Well, if the current—not if the current was running westerly, straight. I wouldn't think so.

X Q. 201. Assuming it was not running exactly straight; in other words, would rounding a turn make her more likely to sheer in a current than as if she were going straight ahead?

A. I really couldn't say.

X Q. 202. You were rounding a turn on both occasions that you have described, were you not, when she sheered?

A. I don't remember, sir, whether there was a turn or not the last time. I know there was a turn just below us where we ran ashore; I don't remember it the first time.

X Q. 203. Do you recall whether you intended to go through the canal when you left Newport News on this trip?

A. I don't know, sir; I don't remember.

X Q. 204. Do you recall any talk with the captain about going through the canal because you were late?

A. No, sir; I don't remember.

X Q. 205. Did you get any orders from him during the trip to go through the canal?

A. No, sir; I don't think I did until after we got up to Wing's Neck and anchored.

X Q. 206. Well, you were the one who set the course, of course, of the ship?

A. What?

X Q. 207. You were the one who determined the course?

A. No, sir; only when I am on watch, that is all.

X Q. 208. If you had been going around the Cape, would you have followed the same course that you did on this trip?

A. Why, no, sir.

X Q. 209. At what point would the course differ?

A. Well, it would differ at many points, sir.

X Q. 210. What?

A. At many points.

X Q. 211. Did you know, when you left Newport News, that you were going through the canal?

A. No, sir.

X Q. 212. Did you think you were?

A. I didn't know, sir.

X Q. 213. You never had been through before loaded?

A. Not loaded; no, sir.

555 X Q. 214. It had been the custom to go around the Cape?

A. Yes, we had been going around the Cape,—yes.

X Q. 215. Now, did you know of any reason for going through the canal loaded this time, when it had been the custom not to go through?

A. No, I didn't know of any reason for going through; that was up to the captain entirely, not to me.

X Q. 216. Where did you understand the ship was bound when you left Newport News?

A. Weymouth.

X Q. 217. Was there any talk about Providence?

A. I don't remember of any.

X Q. 218. Were you not diverted from Providence to Weymouth, do you recall?

A. I don't recall, sir; I don't remember.

X Q. 219. Now, coming to the second day, I will ask you whether, after you had struck, you saw Joseph Lewis around there?

A. Yes, sir.

X Q. 220. What were you doing yourself most of the time before she went off?

A. Well, I was around the ship, sounding the tanks and looking after the pumping of the ship, looking after the tanks and sounding them. I did assist Captain Lewis in making wedges, I believe, for the diver.

X Q. 221. What was Captain Hammett doing?

A. I couldn't say just what. He was around, doing first one thing and then another; talking; I couldn't say just what he was doing.

X Q. 222. Did you have any talks with him at all over the situation?

A. I don't remember,—yes, I suppose I had, but I don't remember what the conversation was whatever.

X Q. 223. But you saw him from time to time?

A. I saw him from time to time around the ship.

X Q. 224. And discussed the situation?

A. I don't remember,—I don't remember what was said about the situation or what the talk was.

X Q. 225. I don't suppose you do, but you, of course, naturally talked with him about the situation?

A. Yes, sir.

X Q. 226. Do you recall any conference that took place at any

time between the captain and anybody else as to what should
556 be done with this ship when she came off?

A. No, sir; I don't remember any conversation about that
whatever.

X Q. 227. The captain never told you of any such conversation
as that?

A. No, sir.

X Q. 228. And you knew of no arrangement having been made?

A. No arrangement whatever; no, sir.

X Q. 229. Now, when the boat went off, the Stuart was tied up to
the Salvor, was she not?

A. I believe so; I couldn't say, sir. I think she was. There was a
tugboat over there tied up along the side; I don't remember which
tugboat it was.

X Q. 230. And the Dalzelline was, as had been described——

A. Up on the port bow; yes, sir.

X Q. 231. And where was the Hazelton?

A. I think she was laying alongside of the Dalzelline.

X Q. 232. What did the Hazelton do when the boat went off?

A. She went down—up the canal somewhere, or down the canal,
whatever you may call it,—to the westward, sir.

X Q. 233. Ahead of you, or behind you?

A. Behind. The Dalzelline took our hawser, and the Hazelton
went in the other direction.

X Q. 234. That is, she went in the other direction to get turned
around, I suppose?

A. I suppose so. I was in a hurry, pulling the hawser over, and
I never took any notice of her.

X Q. 235. What was the position of the Hazelton the first time
you noticed her after the boat went off?

A. The last time I saw him, or remember seeing him, he was go-
ing right straight off from us across the canal, like.

X Q. 236. Didn't you see him after that?

A. No, I don't remember seeing him after that.

X Q. 237. At all?

A. Not until after the accident had happened.

X Q. 238. You didn't see him again until then?

A. No, sir; I don't remember seeing him again.

X Q. 239. And you don't remember seeing the Stuart again, of
course?

A. No, sir; I don't remember seeing either one of them.

X Q. 240. Did you see the Stuart start to take the Salvor?
557 A. I saw the tugboat that had the Salvor, yes; I couldn't
say whether it was the Stuart; I think it was the Stuart.

X Q. 241. Do you know of any reason why your boat could not
have been held there in the deep water instead of going off down the
canal, if these tugboats had been available for the purpose?

A. I don't know, sir; I suppose they could have held her there if
they had wanted to.

X Q. 242. They could have held her with one tugboat, if you had
reversed your engine to assist?

A. That, I couldn't say; I am not a tugboat man, myself, and I don't know much about it.

X Q. 243. But you were master of this very ship, and you know how she handled. Don't you think you could have held her there?

A. Yes, the tugboats could have held her there, of course.

X Q. 244. Was this ship more likely to sheer when she was going fast than when she was going slow?

A. Why, no, sir; if she has got headway enough to steer her, she handles as well one way as the other, I should say.

X Q. 245. Is she more likely to sheer on shoal water if she is going fast than she is if she is going slow?

A. No, sir; I couldn't say she would.

X Q. 246. Did you ever know ships to sheer on shoal water?

A. I have seen ships sheer on shoal water; yes, sir.

X Q. 247. Have you ever been on them when they did?

A. Yes, sir; I have seen ships do that.

X Q. 248. What was the type of ship?

A. I have seen the Crowell ships sheer in shoal water.

X Q. 249. Are they whalebacks?

A. No, sir.

X Q. 250. Were you ever on a whaleback when she sheered in shoal water?

A. No, sir, I never was.

X Q. 251. You never knew of their sheering?

A. No, sir; never knew of them sheering in shoal water.

X Q. 252. Have you ever been in shoal water with them?

A. No, sir; no shoaler than 22 feet, I wouldn't say,—not loaded.

X Q. 253. Where have you taken them in narrow waterways?

A. Well, I have been up the Penobscot River to Bangor, sir, and Providence, and through Hell Gate.

558 X Q. 254. Did you ever know any of them to sheer with you under any conditions?

A. No, sir, I never did.

X Q. 255. Now, Mr. Shelton, will you think again about this going fast or slow? You think that it was shoal water that made her sheer this time?

A. I think so; yes, sir.

X Q. 256. Can you tell us whether she is more likely to sheer in shoal water if she is going fast or going slow?

A. Well, I don't see where it would make any difference.

X Q. 257. What makes a boat sheer in shoal water if she doesn't touch bottom?

A. Because the suction from the bottom, sir, if she goes close to the bottom, makes her sheer to deep water.

X Q. 258. And the faster she goes, the more suction there is, is there not?

A. I should say there was; yes, sir.

X Q. 259. If she is drifting, there isn't any suction to amount to anything?

A. If she is drifting, I suppose not,—if she is drifting, there wouldn't be as much suction; there would be a little suction.

X Q. 260. The suction you speak of is the suction of the propeller?

A. No, sir; it is the suction from the ship getting close to the bottom.

X Q. 261. Hasn't the propeller anything to do with it?

A. Yes, sir.

X Q. 262. If the ship is drifting, and the propeller is not in motion, you would not expect this sheering in shoal water, would you?

A. Not so much.

X Q. 263. Would you expect it at all?

A. Why, yes. Depends upon whether the ship is going ahead or not. If the ship was stopped or had no speed on her, she wouldn't sheer.

X Q. 264. Yes, but if she was drifting,—suppose her engines were not running at all?

A. If the ship were stopped, not going over the ground, she wouldn't sheer.

X Q. 265. Going with the current, but not otherwise.

A. I don't understand that question. I wouldn't say they would make a sheer.

X Q. 266. Was there any reason why you should have gone
559 full speed ahead when you came off this bank down the canal there with the current?

A. I don't know, sir.

X Q. 267. What do you say, as a navigating officer, as to the propriety of that course of action? Would you have done it?

A. I don't know, sir; I think I should leave it entirely to the pilot.

X Q. 268. Never mind about it being up to the pilot. I am asking you now as a navigating officer. What would you say as to that being the proper thing to do under those circumstances? Would you have done it?

A. Well, I don't know. I don't know just how to answer that question.

X Q. 269. All right.

A. If I had been doing my own piloting, I wouldn't have been in there, sir.

X Q. 270. You were the one who wrote up the log, were you not?

A. Yes, sir.

X Q. 271. When did you write up the log after the accident on the first day?

A. That night, sir.

X Q. 272. That night?

A. Yes, sir.

X Q. 273. And when did you write it after the accident on the second day?

A. Some time that afternoon, aboard one of the tugboats, sir.

X Q. 274. That is, you wrote both entries as soon as you possibly could?

A. As soon as I possibly could; yes, sir.

X Q. 275. Did you intend to give an account of what took place each day when you wrote up the log, in this connection?

A. I did, sir.

Mr. Pillsbury: Let me have the log, will you?

[The log is passed to Mr. Pillsbury.]

X Q. 276. This is the log, is it not?

A. Yes, sir.

Mr. Pillsbury: I will offer it.

[The log is marked as "Canal Company Exhibit 22."]

X Q. 277. Now, Mr. Shelton, I will direct your attention to the second day. You stated in the log, in giving the account of the accident the second day, that the ship would not answer her helm, did you not?

A. Yes, sir.

X Q. 278. Is that a fact?

A. Yes, sir.

X Q. 279. Now, at what point was she when she would not answer her helm, in relation to where she struck?

A. Well, I should say from the ferry until the time she struck,—until they broke that sheer to the south and started for the north shore.

X Q. 280. Through all that period she would not answer her helm?

A. No, sir.

X Q. 281. If there were deep water in any of that portion of the canal where she would not answer her helm, how do you account for her not answering her helm?

A. The only way I can account is shoal water; she won't answer—

X Q. 282. But you don't know there was shoal water?

A. No.

X Q. 283. I say, assuming there was not any shoal water, or assuming there was deep water in certain portions of it, how do you account for her not answering her helm in deep water?

A. I don't think she had room enough, sir, after she got out of shoal water, to answer her helm.

X Q. 284. Did she answer her helm at any point in that time there?

A. No, sir; not from then.

X Q. 285. She did not answer her helm?

A. Not from the ferry. I stated in the log-book she wouldn't answer her helm.

X Q. 286. You did not state the point in the log-book, I think, that she did not answer her helm?

A. No, sir; I don't think I did.

X Q. 287. Is it not true that it was just before striking that she would not answer her helm?

A. Just before striking?

X Q. 288. Just before you struck?

A. No, sir; that log-book is written up, not as I know, only from the third mate's statement, and from what I heard others say. I was not in the wheelhouse at the time the ship struck.

X Q. 289. You put down what you understood to be the truth, in your log?

A. Yes, what I understood to be the truth, in my log, of course.

X Q. 290. Where did you understand the ship was when she didn't answer her helm?

A. From the time she sheered from the south shore, sir, until she went ashore on the other side.

X Q. 281. I will ask you again, if there was deep water anywhere along there where she was not answering her helm, what, in your opinion, would be the reason that she would not answer her
561 helm.

A. I think, sir, if there was deep water she would have answered her helm.

X Q. 292. Suppose she does not answer her helm in deep water, how do you account for it?

A. It would be a mystery.

X Q. 293. Did you ever know of a boat smelling a bank as well as the bottom?

A. No, sir.

X Q. 294. Do you not know that if a boat gets too close to the bank in a narrow waterway she will smell the bank, and that she will be caused to sheer?

A. Not to my knowing; no, sir.

X Q. 295. You never heard of that?

A. I never was that close to the bank, sir, to know that a ship would smell the bank.

X Q. 296. With relation to the bank, where was your boat on the second day when she began to sheer?

A. Well, she was just to the westward of the ferry.

X Q. 297. With relation to the bank?

A. What distance off, do you mean?

X Q. 298. Yes, from the bank. What bank was she nearer to?

A. South bank.

X Q. 299. And how near was she to the south bank?

A. I should say probably 60 feet;—75 feet; somewhere thereabout; I couldn't say just how far.

X Q. 300. It is only a 100-foot channel, you know.

A. Well, you asked me from the bank.

X Q. 301. I wanted to be sure you had that in mind. You say she would be 60 or 75 feet?

A. From the ship it looked that way.

X Q. 302. From the ship?

A. As near as I can remember.

X Q. 303. And she was rounding a turn?

A. I don't remember of rounding a turn.

Mr. Blodgett: He doesn't say she was rounding a turn.

X Q. 304. Was she rounding a turn?

A. No, sir.

X Q. 305. Well, will you show us on this map where she was?

A. I don't know whether I can do that or not; I am not familiar with this canal.

X Q. 306. Would you rather have a different chart from this, a sea chart? Some of the witnesses like a sea chart better than this map.

A. If you have one of the canal; yes, sir.

562 X Q. 307. [Placing a chart before the witness.] You need not pay any attention to these marks that some other witnesses have made here, as to where they thought the boat was,—you need not pay any attention to them. Will you indicate, yourself, where she was when she began to sheer the second day,—will you place that?

A. Well, here is the ferry here, isn't it [pointing]?

X Q. 308. Yes.

A. Well, she was just a little to the westward of this ferry when she began to sheer.

X Q. 309. Now, that is a turn, is it not [pointing]?

A. I don't see that that is much of a turn; the turn seems to be more down here where she—where we went ashore.

X Q. 310. Well, that is right at the turn, is it not?

A. Well, I don't know anything much about the canal anyway, sir.

X Q. 311. Well, this is an accurate plan of it.

A. I know she had taken a sheer just this side of the ferry, and she went over here somewhere I should say about three lengths on the north side.

X Q. 312. She went three lengths after she took her first sheer; that is, from the beginning of the first sheer?

A. No; after she broke the first sheer.

X Q. 313. After she broke the first sheer?

A. Somewhere thereabout, I should judge.

X Q. 314. How far did she go before she broke her first sheer, after she began to sheer?

A. After she broke her first sheer?

X Q. 315. No. How far did she go from the beginning of her first sheer up to the time that the sheer was broken?

A. I should say about a length or two, sir; I don't remember just how far she went; short distance.

X Q. 316. Now, will you show us where she sheered on the first day?

A. No, sir, I couldn't; it was about a mile, I should say, in my judgment, from this ferry up here,—somewhere near in this part of the canal [pointing], but I couldn't say just where.

X Q. 317. Well, do you think she was somewhere in there?

A. She was somewhere along here; I really don't know just where.

X Q. 318. I don't want to press you if you don't know.

A. No, sir, I really don't know; I am not familiar with the canal whatever.

563 X Q. 319. Suppose that this boat is in deep water, but in a narrow waterway where there is such a current that, in rounding a turn, the current causes her to sheer; how quickly could that sheer be controlled if there were no other conditions adverse; that is, assuming your steering gear was in proper order and that you had your steam appliances for steering?

A. Well, within a few moments, I should say.

X Q. 320. Don't put it in point of time, if you don't mind, but put it in terms of the length of the ship. You could control it almost immediately, could you not?

A. If it was deep water, I should say you could nearly, sir,—probably take some effect on the ship.

X Q. 321. How far, in comparison with the length of the ship, would she go on this sheer before you could control her?

A. I couldn't say, sir; probably a length or probably more.

X Q. 322. You would expect to control it inside of a length, would you not?

A. Length and a half; somewhere thereabout; depends on how strong the current was, etc.

X Q. 323. Is the manageability of these boats at all affected by their trim?

A. No, sir.

X Q. 324. It does not make any difference what the trim is as to their being manageable?

A. Well, I think the best steering, the best control, is anywhere from 18 inches by the stern to an even keel.

X Q. 325. That is, the trim does have something to do with the manageability?

A. That is the best, I should think.

X Q. 326. Won't you answer the question? Does the trim have anything to do with their being manageable or otherwise?

A. Why, no, sir; it don't have anything to do with it unless you get them too far either way, I suppose.

X Q. 327. If you get them too far either way, what effect does it have?

A. Well, if you put her down five feet by the head she would steer bad, I should say.

X Q. 328. Has she got to be down by the head as much as five feet to steer bad?

A. I don't know, sir; I never was in one of those pigs when she was by the head. I don't know how they would steer,—one of those whalebacks.

564 X Q. 329. She was by the head this day of the second accident, was she not?

A. I should say a foot by the head.

X Q. 330. Yes. You were on the trip before this, and your log shows the trim that you had at the time you left Newport News. Will you tell us what it was,—the voyage before this?

A. The voyage before this?

X Q. 331. Yes.

A. Yes, sir; 18 feet, 2 aft, and 16 foot forward, it is marked here.

X Q. 332. Eighteen, 2, aft, and 16 forward?

A. Yes, sir.

X Q. 333. Now, was that a proper trim?

A. That was all right; yes, sir.

X Q. 334. As you used up your coal and water, she would tend to change her trim, would she not?

A. She would come up some aft; yes.

X Q. 335. And did you intend to make any allowance for that in the way you loaded her?

A. Make some; yes, sir.

X Q. 336. How much allowance would you make for that?

A. About 8 inches between Newport News and Boston.

X Q. 337. Why did you make that allowance?

A. Why, to keep her stern down in the water, sir.

X Q. 338. Why did you want to keep her stern down in the water?

A. Well, it is natural,—we want the ship by the stern in a sea,—don't want her stern to raise too much.

X Q. 339. Why not?

A. Because in bad weather and head sea the ship will handle better if she is down by the stern.

X Q. 340. That is it, she will handle better if she is down by the stern?

A. She won't wash so bad; no.

X Q. 341. Where would you get your heavy seas on this boat?

A. You are liable to get them almost anywhere at sea, sir.

X Q. 342. You would get them as much as soon as you started out, would you not, as anywhere?

A. At Newport News, of course.

X Q. 343. Your allowance would not do you any good until you got to practically the end of your voyage, would it?

A. Depends on how much cargo we have got in. And there are lots of times we don't want to carry an entire cargo, and it makes her more by the stern sometimes than others.

565 X Q. 344. Is it not a fact that you intended to start out with that boat in the proper trim at the time you left port?

A. She was started out at the proper trim.

X Q. 345. That is, that was your intention, was it?

A. Yes, it was our intention.

X Q. 346. You were not trimming her further down at the stern than you supposed was the best trim to put her in, were you?

A. We were supposed to be giving her the best trim; and I think her trim was that, sir.

X Q. 347. This talk about an allowance as to how she would be at the end of the voyage, you do not really mean, do you?

A. I really mean her stern will come up 8 inches between Newport News and Boston.

X Q. 348. Suppose you were going to trim her without any regard to the stern coming up, what do you say is the best trim,—how much drag should she have?

A. If I was loading her, I should give her, if she didn't come up any by the stern, I should give her about a foot drag leaving Newport News.

X Q. 349. Is not 18 inches recognized as the proper drag?

A. Anywhere there; I have left with a foot and with 18 inches and have left with two feet as far as that goes.

X Q. 350. Don't you understand 18 inches is the drag she was supposed to have?

A. Not particularly; no, sir.

X Q. 351. What drag did she have on the trip before this?

A. Two foot, 2, by the stern.

X Q. 352. When you got to the canal how did you determine what she was drawing?

A. By looking over the side, sir.

X Q. 353. Both forward and aft?

A. Yes, sir.

X Q. 354. Will you look at this photograph and notice the figures on the side of her?

A. Yes, sir.

X Q. 355. Now, was the boat in that condition as to these figures, at this time?

Mr. Blodgett. What time do you mean?

Mr. Pillsbury: At the time of this accident.

The Court: That is, you mean the same markings?

Mr. Pillsbury: Yes; I mean, were they the same marks?

566 A. What do you mean,—her marks? Yes, the marks was just the same,—in the same place, sir.

X Q. 356. Were the marks the same?

A. I think so; I don't see any difference in them.

X Q. 357. What is the highest mark there?

A. Why, 18 foot, I think, and 16 forward,—17 forward.

X Q. 358. Now, if you looked over the side and she was deeper than the 17, you could not tell what she drew, could you?

A. You could tell about; yes, sir.

X Q. 359. Well, you would have to guess at it, would you not?

A. Yes. You could guess within an inch or two. I don't remember whether it was the Bay Port or the Bay State I painted an extra number on,—I couldn't say whether it was the Bay Port or Bay State,—one of the two I have been in. I think those are the same marks. I don't remember whether the Bay Port at the time she was lost,—whether she had 19 aft, or whether it was 18. I couldn't say. That shows 18, I think.

Mr. Pillsbury: I am afraid my eyes are not quite good enough to make those numbers out. I don't know whether your Honor could see them or not.

The Court: I don't think it is important.

X Q. 360. After the Bay Port sank, were you picked up out of a yawl boat?

A. Yes, sir.

X Q. 361. By Donnelly of the Dalzelline?

A. One of the tugboats,—the Dalzelline; yes, sir. I don't know who was captain of it.

X Q. 362. Do you know Mr. Donnelly?

A. No, sir.

X Q. 363. Did you see him testify?

A. Yes, sir.

X Q. 364. Can you say whether he was the one that picked you up, or not?

A. I couldn't say whether he was the man or not.

X Q. 365. Somebody picked you up out of your boat?

A. Yes, sir.

X Q. 366. Did you have any talk with him?

A. I don't remember of any; no, sir; the only thing, he asked me why I left her, and I told him I was afraid the boiler would blow up.

That was all, I guess,—all I remember of saying to him.

567 X Q. 367. Do you know Mr. Lecompte, the captain of the Hazleton?

A. No, sir.

X Q. 368. Did you ever have any talk with him?

A. No, sir; not to my knowledge.

X Q. 369. Do you know pilot Rochester?

A. I saw him, yes, sir, when he came aboard.

X Q. 370. Did you have any talk with him?

A. No, sir; not to my knowledge.

X Q. 371. Now, will you say that you did not say to all three of those men that this was a bad-handling boat and that you advised the captain against coming into the canal?

A. Made no such statement, sir.

X Q. 372. You made no such statement to all or any of them?

A. To all or any; no, sir.

(By Mr. Park:)

X Q. 373. Just one question, captain: Were you in a position to hear any orders given by pilot Lewis after she came off the first time?

A. No, sir.

Mr. Park: That is all.

Redirect examination.

(By Mr. Blodgett:)

Q. 374. Mr. Shelton, who trims the vessel at Newport News when she is loaded?

A. I do, sir,—the mate.

Q. 375. And on the trip before this, that you were asked about, you had 2,339 tons, did you not?

A. Yes, sir.

Q. 376. On this trip, you had 2,399, did you not?

A. 2,393, I think.

Q. 377. 2,393?

A. Yes, sir.

Q. 378. How much was the extra draft that you drew, caused by that extra tonnage?

A. Well, there is lots of times the coal is lighter than some other times; lots of times you load heavy coal, and again you load lighter coal. What I mean by "lighter coal," the coal will fill the ship up more, and there won't be as many tons as there will be at other times.

Q. 379. And this was the cargo which was given you to bring up?

A. Yes, sir.

Q. 380. And it was about the usual cargo?

A. About the usual cargo; yes, sir.

568 Q. 381. You had brought more, and you had brought less, I suppose?

A. Yes; I have seen 2,430 ton in her, I think.

Q. 382. On this occasion you had your vessel trimmed to 18, 10, aft, and 17, 6, forward?

A. Yes.

Q. 383. And you made that memorandum in the log?

A. In the log-book; yes, sir.

Q. 384. And, in your judgment, was that a proper trim for the vessel?

A. Yes, sir.

Q. 385. Knowing that she was going to be lightened coming up?

A. Yes, sir.

Q. 386. About how far below the ferry was it that your vessel struck the north bank the second time?

A. Below the ferry?

Q. 387. Below the ferry.

A. Well, I don't remember; I should say a quarter of a mile.

Q. 388. You were on the sheer when you went by the ferry?

A. Yes, sir; we were getting—just getting the sheer when we went by the ferry.

Q. 389. Can you give us any reason why the sheer that time was longer than it had been the first day?

Mr. Pillsbury: I don't want to keep objecting, but I must object to this as leading.

A. Only the current was with us, I should say, sir.

Q. 390. In your judgment, would that have the effect to prolong the sheer, carrying her further along?

A. Carrying her further along; yes, sir.

Q. 391. I understood you to say you never saw the Hazelton after you came off and started down the canal?

A. I don't remember seeing her after she went out in the stream, went out in the middle of the canal.

Q. 392. So far as you know, she did not come up to you and offer you a hawser?

A. Never saw her; no, sir.

Q. 393. If she had been very close to you at the time you struck, would you have known she was there?

A. Well, yes, sir; probably I would,—probably I would have seen her.

Q. 394. What would have caused it?

A. Probably I would have tried to get aboard of her if she had been pretty close.

569 Q. 395. Did your stern swing over to the south bank until it blocked the canal?

A. Yes, sir; went over to the south bank.

Q. 396. And it did not hit her in swinging over, did it?

A. No, sir.

Q. 397. You were asked if you could not have reversed your engines. What effect would that have had upon the bow of your vessel?

A. I couldn't just say, in a current of that kind, sir; I don't think that would have much of any effect on the bow of the ship.

Q. 398. In ordinary times the reversing of your engines would throw your bow which way?

A. Reversing the engines would throw the bow—I don't see where it had but very little effect on the bow, sir.

Q. 399. You were asked if you did not think you were going too fast, going down the canal with the current, if your engines ran at full speed. You stated, as I understood you, that, in your judgment, your vessel was going about five or six knots with the current that day?

A. With the current; yes.

Q. 400. Did you have to go faster than the current in order to steer?

A. Yes, sir.

Q. 401. And about how many knots speed would you have to have to give your boat steerageway over the current?

A. I should say three knots.

Q. 402. In your judgment, was she at any time going faster than was required to give her steerageway that second day?

A. No, sir.

Q. 403. Until you took that sheer to the south bank, by the Trilby, and went to the ferry, how had you been proceeding down the canal, as far as your location was concerned?

A. Very good.

Mr. Pillsbury: That has been entirely covered.

The Court: Yes, you have been all over that.

Mr. Blodgett: I mean, as to what portion of the canal. Mr. Pillsbury asked him whether he was near the ferry.

The Court: Whether in the centre or otherwise?

Mr. Blodgett: Whether in the centre or otherwise.

Q. 404. Where was your boat proceeding, in what portion of the canal,—the centre, or on either side?

A. In the centre, sir.

570 Q. 405. And when you went by the Trilby, did you go as near the Trilby as you thought, in your judgment, was safe?

A. Yes, sir.

Mr. Blodgett: That is all.

Mr. Pillsbury: That is all.

LEROY MAKER (sworn).

(By Mr. Blodgett:)

Q. 1. What is your full name, Mr. Maker?

A. Leroy Maker.

Q. 2. How old are you?

A. Thirty-two.

Q. 3. Where do you live?

A. Newport News, Virginia.

Q. 4. How long have you been to sea?

A. Six years, sir.

Q. 5. And before that how long had you been on vessels?

A. Off and on all my life. My father is a sea captain, and I have been with him a good deal.

Q. 6. How long an experience have you had in the steering of boats?

A. Three years.

Q. 7. How long a time have you had practical experience in steering vessels with your father and otherwise before you went to sea on vessels?

A. Well, sir, I couldn't give you the time; but I was a very small boy when I went with my father; and I used to steer since I was big enough to get behind the wheel and hold it.

Q. 8. In other words, you have been used to the water and working on boats all your life?

A. Yes, sir.

Q. 9. Do you have a second mate's license?

A. Third.

Q. 10. Third mate's license. And how long did you say you had been a certified helmsman?

A. I have been certified two years on the Morgan Line, on their boats, that counted for me to get my license.

Q. 11. Before you got your license?

A. Yes, sir.

Q. 12. And you have had your license how long?

A. I just had it then.

Q. 13. You just had it?

A. The October previous.

Q. 14. The October previous. You were on this Bay Port, and you had the wheel going through the canal, on both occasions?

A. No, sir,—on both occasions at the sinking; yes.

Q. 15. On the occasion of both strandings?

A. Yes, sir.

571 Q. 16. Before the first stranding was anyone in the wheel-house with you, or were you alone?

A. Why, the pilot and Captain Hammett were both in there.

Q. 17. They were both in there?

A. Yes, sir.

Q. 18. And how did your vessel steer that day?

A. Why, she steered very good, sir.

Q. 19. Do you know of any sheering before you got to the Buzzard's Bay bridge?

A. Nothing, sir.

Q. 20. Nothing noticeable?

A. Nothing noticeable; no, sir.

Q. 21. After you passed through Buzzard's Bay bridge, how did she steer?

A. Why, she steered very good, sir; she went right along behind the tugboat.

Q. 22. Did you have any difficulty in keeping her there?

A. No, sir.

Q. 23. What was the first you noticed of any appreciable sheer that day?

A. Just before we ran ashore we took a sheer to port, a small sheer; it wasn't so much of a sheer as hanging to the bank, that way, you know; and she wouldn't come out, wouldn't answer her wheel.

Q. 24. Wouldn't come out from the bank?

A. No, sir. It wasn't exactly a sheer. But when she did let go, she went on a rank sheer to the starboard.

Q. 25. To the starboard side?

A. To the starboard bank.

Q. 26. Did you receive orders from the pilot on that occasion?

A. Yes, sir.

Q. 27. Did you obey those orders?

A. Yes, sir,—oh, yes.

Q. 28. Now, when she took this rank sheer to the south bank,—that is, to your starboard,—what did you do?

A. I put the wheel over as the pilot told me.

Q. 29. Just tell what happened. Did she mind her helm?

A. No, sir; she kept on going, and we got the wheel hard over, and she stopped swinging, but she was too far gone to come back.

Q. 30. At the time she struck had she stopped her swing to starboard?

A. She had stopped her swing; yes, sir.

Q. 31. And how was she heading in the canal, with reference to being parallel with it, at the time she struck?

A. Very near parallel, sir,—very near.

Q. 32. How fast do you think your vessel was going—

A. Through the water?

Q. 33. —over the ground—well, do you know how fast the current was? You knew the current was against you?

A. I knew the current was against us; yes, sir.

Q. 34. Could you tell how fast you were going through the water that first time, against the current?

A. I should judge about six miles an hour.

Q. 35. Through the water?

A. Yes, sir.

Q. 36. Was there any reason that you could see why she would not steer and answer her helm?

A. Only shoal water, sir; that is the idea I had when she refused the first time there.

Q. 37. Now, where were you when the vessel came off?

A. I was aft of the pilot-house on deck, on the starboard side.

Q. 38. In the pilot-house?

A. Aft of the pilot-house.

Q. 39. Did you first notice her move, or did some one call to you?

A. Everybody was shouting, and I looked out and saw the bank going by, and I ran in the wheelhouse.

Q. 40. Did you see your captain?

A. He was coming up the ladder, sir, or coming along the deck.

Q. 41. Did you see pilot Lewis?

A. Yes; ahead of him.

Q. 42. On your vessel?

A. Yes, sir; well, when I went in the wheelhouse he was coming up the ladder.

Q. 43. Did they go into the wheelhouse, or did they go up on top?

A. They went up on top, sir.

Q. 44. Who else was in the wheelhouse with you from that time until the accident?

A. Captain Hart, the second mate.

Q. 45. Where did he stand?

A. Stood right under a hole that is in the top of the house right behind the wheel.

Q. 46. That is, there is a hole going up, where they call down the orders?

A. Yes, sir.

Q. 47. And he stood under that?

A. Stood under the hole, to pass the word.

Q. 48. And he passed orders to you?

A. Yes.

573 Q. 49. You could not tell who gave the orders or the bells, could you?

A. No, sir, I couldn't tell.

Q. 50. And you steered from that time according to orders given you in that way?

A. Yes, sir.

Q. 51. And you first started off and your engines started and got steerageway on her, how did she steer?

A. Why, she steered very well, sir. Of course, we were going pretty slow at first.

Q. 52. You were drifting first, of course were you?

A. Sure, we did; and when she started up the engines didn't go very fast; she didn't pick up steerageway very fast.

Q. 53. And your vessel was somewhat down by the head that morning?

A. Somewhat; yes, sir.

Q. 54. But as you gathered steerageway, how did she handle, how did she steer?

A. Well, she answered the wheel very well, sir.

Q. 55. What was the first time that she sheered appreciably after you started, with reference to the lighter Trilby?

A. I don't remember much about the Trilby, sir, but it was just west of the ferry, there, the little ferry.

Q. 56. Just west of the ferry. You don't remember the Trilby?

A. I remember there was a dredge there, but I don't remember just where she was laying, sir.

Q. 57. Which side did you leave the dredge on?

A. I don't remember, sir.

Q. 58. You don't remember?

A. No, sir; not at the time.

Q. 59. What was it that you first noticed, what sheer,—which way did she sheer the first time?

A. She sheered to the starboard bank.

Q. 60. To the starboard bank?

A. Yes, sir.

Q. 61. And did you succeed in breaking that sheer?

A. Yes, sir.

Q. 62. Where were you, with reference to the ferry, when that sheer was broken?

A. Well, just pretty close to the ferry; right about at it, sir, when she stopped sheering and started the other way.

Q. 63. Then she started the other way?

A. Yes, sir.

Q. 64. Were you able to break the sheer the other way?

A. No, sir.

Q. 65. And she landed on the bank with her bow?

A. Yes, sir.

574 Q. 66. And after her bow landed, what did she do; did her stern swing around with the current, or did her bow come off?

A. She backed off, and her stern hit the other bank, her stern hit the south bank, and then she straightened up a little bit and headed out of the canal and sunk.

Q. 67. Headed towards Sandwich?

A. Yes, sir.

Q. 68. Did you see a tug that was following you down at or before the time you sank?

A. No, sir; I couldn't see her from where I was.

Q. 69. You were in the wheelhouse?

A. In the wheelhouse.

Q. 70. And that was on the very after part of the vessel?

A. Yes.

Q. 71. About how far from the stern do you suppose you were standing?

A. I suppose 50 or 60 feet.

Q. 72. And you did not see her at all?

A. No, sir; there is a blank wall in the after end of the wheelhouse, and unless you stretch up you can't see out of it.

Q. 73. How fast do you think your vessel was going with the current the second day?

A. Through the water she was probably going six miles an hour, sir.

Q. 74. Through the water, or over the ground?

A. Through the water.

Q. 75. And the current in addition, do you mean?

A. No, sir; I don't mean that. I was thinking of the current going the other way.

Q. 76. How fast do you think she was going the second day?

A. Through the water or with the water?

Q. 77. Put it either way,—put it both ways; through the water and over the ground.

A. Well, I should say she was going over the ground about six miles an hour, and it would be through the water about three or four. I don't know how the current was running. It was running with us.

Q. 78. You don't know how fast the current was?

A. No, sir.

Q. 79. But it was with you?

A. With us.

Q. 80. Did your vessel have steerage way that second day?

A. Yes, sir.

Q. 81. And to do that, you had to go faster than the current?

A. Had to go faster than the current.

575 Q. 82. About how much speed over the current would give you steerage way, in your judgment from your experience with that boat?

A. Oh, anywhere from two to three miles an hour she would steer.

Q. 83. Do you know what bells were given or signals were given to the engine-room that day after you came off?

A. No, sir.

Q. 84. You don't know, you didn't pay any attention?

A. No, sir.

Q. 85. As you steered along down the canal on this second morning, what portion of the canal did you proceed in with reference to the centre of the canal?

A. Why, pretty close to the middle, sir.

Q. 86. And how far did the sheer to the south bank carry you over towards the bank, do you think?

A. We was pretty close to the ferry when we passed it, sir; about 40 feet from the ferry, I should say—30 to 40 feet; very close to it.

Q. 87. You had been through the canal before?

A. Yes, sir.

Q. 88. Had you ever been through on one of these pig barges there before?

A. Not loaded, but light.

Q. 89. But light?

A. Yes, sir.

Q. 90. You had been through on other vessels loaded, had you, and light, both?

A. Loaded and light, too; yes, sir.

Q. 91. How many times had you been through the canal?

A. That was my sixteenth trip if we had got through.

Q. 22. Could you see anything that caused your vessel to sheer on this second day?

A. I couldn't see anything, sir, but imagined it was shoal water or something of that kind.

Mr. Pillsbury: I never know how much to interrupt—but you will save my exception?

The Court: Yes.

Q. 93. Was there anything with reference to the steering of the vessel that caused her to sheer?

A. No, sir.

Q. 94. Did her being by the head make her harder to handle?

A. Well, sir, I couldn't tell you. I hadn't been in her enough to know how she handled. It was only my second trip in her.

Q. 95. Well, did she sheer harder on the second day, or
576 did you notice any difference, until she took the sheer up there near the ferry?

A. I didn't notice any difference until she took the sheer, sir.

Q. 96. Do you know who gave the orders that came down to you that morning, that second day?

A. Why, I couldn't tell you, sir.

Q. 97. You couldn't tell?

A. No.

Q. 98. You took soundings at midnight on that night, did you?

A. Yes, sir.

Q. Do you remember what you found?

A. I think we had 16 feet. I am not sure of it, though, whether it was 16 or 18.

Q. 100. Did you execute all orders as received?

A. Yes, sir.

The Court: Do you mean you sounded the well?

The Witness: Yes.

The Court: She was practically full of water?

The Witness: She was practically full; yes, sir. She was on a list, you know.

Cross-examination.

(By Mr. Pillsbury:)

X Q. 101. Mr. Maker, do you say there was no difference between the ease of handling her the first day and the second?

A. After she got her headway; no, sir. Of course, when she first went off in the canal with nothing but the current, there was no steering her; nothing to do but to wait until she got headway enough to go.

X Q. 102. How long did that condition last, how long was it before she got headway?

A. Oh, it wasn't but three or four minutes, probably two or three minutes after that, that she commenced to pick up her headway, and she steered very well, sir.

X Q. 103. For two or three minutes you couldn't steer at all, couldn't you?

A. Just drifted.

X Q. 104. And how far down the canal did you go in that condition?

A. Oh, I suppose a third of a mile, probably—maybe not as much.

X Q. 105. She was not drifting that whole third of a mile, was she?

A. Very near, sir.

X Q. 106. You started her engines immediately when she
577 went off, did you?

A. Not immediately. The pilot had to get up to the bridge, first, and then the signal was given to the engine-room; and you can't open a marine engine right on the start, you know—got to have the water worked out a little bit.

X Q. 107. How soon after she went off did you get your engines started?

A. I couldn't tell you how soon that was.

X Q. 108. How far had she gone before the engines were started?

A. I couldn't tell you, sir.

X Q. 109. Well, did you know when the engines were started?

A. I could feel the vibration.

X Q. 110. And the order was given to start the engines immediately when she went off, was it not?

A. Certainly, as soon as he could get there.

X Q. 111. You say that she did not handle for a third of a mile, you could not make any effect on her with your wheel?

A. No, sir.

X Q. 112. What was guiding her that third of a mile; who was taking care of her?

A. Drifting with the current, I suppose.

X Q. 113. Was anybody helping her, any tug?

A. Well, in a little while, as soon as the tug could get in position and hooked on to her.

X Q. 114. Did the tug get into position before she had gone this third of a mile?

A. Not much before that; no, sir.

X Q. 115. When the tug got into position and got a hawser on her, it began to tow her?

A. Yes, sir; straightened her up.

X Q. 116. What effect did the tug have on her being easy to handle, or otherwise?

A. It helped her out, gave her some headway.

X Q. 117. Up to that time won't you describe just how she went; did she go from side to side, or roll?

A. No; she just was laying on an angle with the canal, drifting along with the current.

X Q. 118. The tug straightened her out?

A. The tug straightened her out and went on.

X Q. 119. When the tug straightened her out and went on, did she immediately have steerageway then?

A. Yes, sir; she picked up steerageway very fast.

X Q. 120. How far had you gone when she really got under your control in steering?

A. I said about a third of a mile.

578 X Q. 121. About a third of a mile?

A. I suppose so.

X Q. 122. About what is the capacity of speed of your ship?

A. Well, sir, I guess she would make about nine outside.

X Q. 123. Wouldn't she make as much inside as outside?

A. If she had been wide open she would have; yes, sir.

X Q. 124. What was the signal given at this time when the engines were started?

A. The first signal, I believe, was full speed, but I am not sure of any other of them.

X Q. 125. You do not remember any signal except that of full speed?

A. That is the only one I heard at all.

X Q. 126. Did she get fully under way before she struck that second day?

A. Oh, yes, sir; she was going pretty good.

X Q. 127. How long had she been fully under way before she struck—what distance? I won't put it in time, but in distance. How far had she gone under full headway before the struck?

A. Probably three-quarters of a mile.

X Q. 128. And did you say the best speed she made for the three-quarters of a mile, even with the assistance of the current, was six miles an hour?

A. That is all; yes, sir.

X Q. 129. How do you account for her not making better speed than that?

A. Well, her engines were not ready.

X Q. 130. Well, by that time they had got going in good shape, had they not?

A. It takes half an hour or so to get the engines warmed up; they don't open them up right off, you know.

X Q. 131. Was there any other reason?

A. That is all I can account for.

X Q. 132. Would the fact that she was low in the water, that she had water in her and was logy and had a list and was down at the head, in any way account for her not making better speed?

A. Yes, that would make some difference in the speed.

X Q. 133. That would affect it, would it not?

A. It might.

X Q. 134. When a boat is in that condition does she handle as well as when she is free from water and is in the proper trim and has no list?

A. No, I don't suppose she would handle as fast.

X Q. 135. And she rolls around and is more unmanageable, is she not?

A. She didn't roll any, sir.

579 X Q. 136. Didn't roll at all?

A. No, sir.

X Q. 137. Does a current in a narrow waterway have any effect on a boat as tending to cause it to sheer?

A. Yes, sir, sometimes.

X Q. 138. And is that particularly true if you are going around a turn?

A. It might be and might not.

X Q. 139. You had been through the canal sixteen times before this, both loaded and light, on various boats?

A. Yes, sir.

X Q. 140. You had been through on this very boat how many times?

A. Once before.

X Q. 141. Once before?

A. Yes.

Mr. Blodgett: Light?

The Witness: Light.

X Q. 142. Light. Had you noticed any unusual condition of affairs at this so-called station 230, this so-called "knuckle"?

A. No, sir, I hadn't noticed it.

X Q. 143. Had you had any difficulty with any of your boats sheering at any of the places in the canal that we have been speaking about?

A. I don't know as any of the places, but the boat I was in previous to that used to sheer a little bit.

X Q. 144. I am speaking of the places in question here.

A. I couldn't tell you, I am not familiar enough with the places.

X Q. 145. I am speaking about the places where you say the Bay Port sheered.

A. Well, I never noticed it there before; no, sir; she wasn't as deep draft a boat, but she sheered.

X Q. 146. Well, if she didn't sheer at any of these places that the Bay Port sheered, I don't care about it. She didn't sheer at any of the places the Bay Port sheered?

A. I couldn't say that, sir.

X Q. 147. Did any of your other boats, when you went through on any of these trips, sheer at any of the places the Bay Port sheered?

A. I couldn't tell you about the places.

X Q. 148. You do not remember of ever having any trouble with them, do you?

A. At that particular place, no.

X Q. 149. Or at any of the particular places?

A. Well, places,—well, no.

X Q. 150. Were you the one who gave the information for writing up the log?

A. I might have given him some.

580 X Q. 151. And in the log you say that she would not answer her helm when you were swinging before the accident on the second day; and you do not say anything about her not answering her helm upon the occasion of the accident the first day. Do you want to look at the log and refresh your memory?

Mr. Blodgett: He did not enter that in the log.

Mr. Pillsbury: But I understood the mate to say that he made in up on the information given him by the third mate.

Mr. Blodgett: The first mate wrote the log.

X Q. 152. Look at the account of the accident on the second day, Mr. Maker.

A. The 14th?

X Q. 153. The 14th; yes. You say there, do you not, that she would not answer her helm?

The Court: No, he does not say that at all. Why don't you put it to him accurately?

Mr. Pillsbury: I intended to.

The Court: He does not say anything. It is the mate's log.

Mr. Pillsbury: Yes; but the first mate testified that he made it up on the information given him by the third mate.

The Court: Then put it accurately. This witness does not say anything in the log.

Mr. Pillsbury: Well, strike that out.

X Q. 154. Did you inform the first mate, for the purpose of making up the log, that she would not answer her helm on the second day?

A. Yes, sir.

X Q. 155. Did you inform him that she would not answer her helm on the first day?

A. I don't remember.

Mr. Blodgett: Mr. Hart kept the log on the first day,—the first mate didn't write it.

The Court: I do not think there is any occasion to interrupt. Mr. Pillsbury is all right. Go ahead.

X. Q. 156. What do you say as to my question as to whether you told him that the ship would not answer the helm on the first day?

A. I don't remember telling him anything on the first day about it.

X Q. 157. Did you tell him anything about a sheer in connection with the first day?

A. I couldn't say about the first day, sir.

581 X Q. 158. Did you tell him anything about a sheer in connection with the second day?

A. Yes, sir.

X Q. 159. Did you tell him about more than one sheer in connection with the second day?

A. I don't remember about that, sir.

X Q. 160. You do not remember of telling him about any more than one sheer?

A. Any more than one.

X Q. 161. In reply to Mr. Blodgett you said that the first day she would not come off the bank. That was just previous to her taking this rank sheer?

A. Yes, sir.

X Q. 162. What did you mean by that expression, that she would not "come off the bank"? In the first place, how near the bank was she?

A. Well, I couldn't tell you, but I know she was some little distance out,—out of the centre.

X Q. 163. Towards which bank?

A. Towards the port bank and running along parallel with it.

X Q. 164. How far out of the centre was she?

A. She wasn't more than her width.

X Q. 165. And how wide was she?

A. Well, say 50 feet out of the centre towards that bank, and she wouldn't swing away from it.

X Q. 166. She didn't sheer at that time, but she just clung to the bank, and you could not get her away?

A. Clung to the bank.

X Q. 167. Isn't that what you call "smelling the bank"?

A. Well, no, sir; I shouldn't think so.

X Q. 168. Did you ever hear that expression?

A. Yes, sir.

X Q. 169. That is just what you mean by "smelling the bank," is it not, that she would cling to the bank and you could not get her away?

A. I have heard it called "smelling the bank" when she would take a rank sheer away from the bank.

X Q. 170. That is what she did do in this case, is it not?

A. Yes, sir; she did later.

Redirect examination.

(By Mr. Blodgett:)

Q. 171. She had sheered to port before this time when she wouldn't come back, as I understood you?

A. Yes, sir.

Q. 172. She had sheered to port?

A. Yes, sir.

582 Q. 173. Just before that?

A. Yes, sir.

Q. 174. And then she didn't come back as you thought she ought to and she finally sheered over to starboard?

A. Yes, sir; she let go the bank and the wheel was hard over, you see, nearly.

Q. 175. And that was under your pilot's orders?

A. Yes, sir.

Recross-examination.

(By Mr. Pillsbury:)

X Q. 176. I think perhaps I did not understand you on your direct examination. I thought you said that the first day this was not so much of a sheer in the first place, but it was a clinging to the bank,—was not that what you said?

A. A slight sheer or clinging to the bank.

X Q. 177. You said it was not so much of a sheer as a clinging to the bank, did you not?

A. Yes, sir.

X Q. 178. You did not mean to say that before that clinging to the bank she had sheered, did you?

A. No.

X Q. 179. She clung to the bank, and then she took this sudden rank sheer and went into the bank?

A. Went into the bank on the other side.

X Q. 180. Went into the bank the other side?

A. Yes, sir.

Redirect examination.

(By Mr. Blodgett:)

Q. 181. Before she clung to the bank after that first sheer, where was she in reference to the centre of the canal?

A. About the middle of it.

Q. 182. And this clinging to the bank and slight sheer took her about fifty feet, did you say, from the centre?

A. Fifty or sixty.

Q. 183. Fifty or sixty feet out of the centre.

A. Yes.

Mr. Pillsbury: I don't know how long we ought to keep this up. The Court: I think I understand it.

Mr. Pillsbury: If your Honor understands it——

The Court: Yes, I think I understand his view about it.

Mr. Blodgett: I want to say that the two engineers that were on the Bay Port at the time, we tried to get; but they are at present in France, and we cannot get them. Mr. Pillsbury called for our engineer's log and examined it, and therefore I want to offer it.

583 The Court: Let me see that. I was wondering what that showed.

Mr. Blodgett: It is very short.

[The engineer's log is marked as "Bay Port Exhibit 14."]

The Court [looking at the engineer's log]: There is nothing very much there.

Mr. Blodgett: Except it says "working to signals."

The Court: "Working to bells;" yes.

Mr. Blodgett: "To signals." And you remember when the captain testified he said he started full speed, but he didn't know what was ordered afterwards, but he ordered according to what the pilot said. And you will note the time she floated there is stated as 10.15, and she struck again at 10.32,—17 minutes later.

The Court: The measured distance along the canal between those two strandings, the final stranding and the first one, was about 6,000 feet, was it not?

Mr. Park: 6,100, I think.

The Court: 6,100?

Mr. Park: Yes, from station 169 to station 230.

SYDNEY A. REEVE (sworn).

(By Mr. Blodgett:)

Q. 1. What is your name, professor?

A. Sydney A. Reeve.

Q. 2. And you live in New York?

A. Yes, sir.

Q. 3. Your occupation is what?

A. Consulting engineer.

Q. 4. How long have you been in that line of business?

A. I have been operating twelve years independently.

Q. 5. And what was your education? You were a Yale graduate?

A. I received two degrees in engineering from Yale and was instructor for a short time. I was then in the employ of the Westinghouse Companies for seven years; I spent one year in technical journalism and then became professor of steam and hydraulic engineering at the Worcester Polytechnic. I was lecturer on engineering at Harvard for one year, and was lecturer at the Graduate School at Annapolis for a year on hydraulic interaction between ships, and thermodynamics.

Q. 6. Have you studied that in reference to suction between vessels and banks?

A. Yes, sir; in 1912 and 1913 I published in London a series of articles, which, so far as I know, is the only statement on the general principles of suction.

Q. 7. Have you made a study of the action of water on vessels in narrow waterways?

A. Yes, sir; I have testified repeatedly in admiralty cases.

Q. 8. Now, professor, have you been here during this whole trial?

A. Yes.

Q. 9. And have you examined the plans of this canal that were put in by the other side?

A. I have.

Q. 10. And the shoal spots?

A. Yes.

Q. 11. And have you examined the diagram which was put in by Mr. Dunbar—

A. Yes.

Q. 12. —showing what experiments they had made down in the canal there for deflection?

A. The current diagrams, the float; yes.

Q. 13. The current diagrams?

A. Yes.

Q. 14. And have you made a chart or a plan or a blueprint showing the situation,—covering the situation of the first grounding and the shoal spot before you get to it, and covering the deflections which the plan which they put in shows?

A. I have.

Q. 15. Have you it there?

A. Yes, sir.

Mr. Blodgett: Perhaps your Honor would like to see one of these blueprints of it.

The Witness: I think his Honor would prefer to see the original, because the original has red and black ink, which does not show on the blueprint.

Mr. Blodgett: Let him have the plan and you can explain it from the blueprint.

Q. 16. Now, professor, will you please explain, in the first place, how you made this up?

A. This diagram is, in its central and left-hand portion, a replica of the Canal Company's Exhibit 3, I think it is, showing the observations and progress of float, on top of that.

Q. 17. Is that drawn accurately to scale, the whole thing?

A. This is drawn not only to scale, but the lines connecting the observations are drawn more accurately than in the original.

585

Q. 18. Now just go on.

A. The right-hand portion of my diagram, in broken lines, is a mere extension of the right-hand end of the Canal Company's Exhibit 3 in parallel lines, there being nothing in the record to show just what was the conformation of the bank at that point.

Q. 19. And the figures of the depth of water there are taken from their exhibit?

A. They are taken from their Exhibit 6, I think it is. The location of the final stranding of the vessel at 3, at the upper left hand, is taken practically from your exhibit. It is the one with the boulders on, with the position of the vessel drawn in pencil.

Q. 20. That is the one produced by Mr. Crocker that he said he drew?

A. I have forgotten the witness' name for the moment.

Q. 21. Is that it [pointing]?

A. That is it.

Q. 22. That is Bay Port Exhibit 2.

A. The position of the Bay Port, the length and beam of which are drawn to scale, which is numbered 1, is drawn in relatively to

position No. 3 according to Captain Hammett's testimony that at the time of the first sheer the ship was four or five lengths below where she finally struck. Position 1 is four and a half lengths below. The entire range of the original position of the ship within his testimony is shown by the line Y, Z,—Y being the position of the bow of the ship if we take his maximum statement and Z the position of its stern if we take his maximum statement. The position of the Bay Port marked figure "2" is drawn from the mate's testimony that at the time that she entered on her first sheer she was about three lengths below the place where she finally stranded. I should state that the lateral position of diagram 2 has no bearing; it is not based upon anything in the record; I mean the exact lateral departure from the axis of the canal is merely drawn in that way to show that up to that position in the canal there was a sheer to port which was recovered and then a final sheer to starboard to the point where she struck.

Q. 23. And then you have gone across to No. 3, which is the position that was given by Mr. Crocker as the position where she finally landed?

A. Yes. The broken line connecting positions 1, 2 and 3 is not intended to signify the course of the ship, but as merely connecting up the positions to the eye, since those are straight lines drawn connecting the bow.

Q. 24. In reference to the lines which were taken from their exhibit showing the floats that were tried at that point, what do they show?

A. These float measurements show substantial lateral currents in the canal. Before proceeding to describe them, I should call attention to the fact that this exhibit represents only six observations made upon a certain day at a given hour of tide. What might have occurred at other times must be inferred from what we find included in these six by chance. Now, the six to include, each of them, a marked lateral current at one point or another. These points of lateral current I have marked on the diagram A, B, C, D, F, G and H, as representative ones. And the significance of these lateral departures of the float from a straight line I have tabulated at the upper right of the diagram. In that table, the first column indicates the particular lateral current in question; the second column gives the lateral departure in feet; the third—

Q. 25. The longitudinal?

A. Yes, the third column gives the longitudinal duration of the swerve or current, and the last column gives the computed time in seconds which it would take that current to deflect a ship of the length of the Bay Port by one point, assuming that it acted for that length of time?

The Court: With no other force?

The Witness: With no other force. In order to elucidate the last column, I have put below the table a statement that a variation of one point amounts to a lateral deflection of the bow of 36 feet.

The Court: That is figured on her length?

The Witness: Upon the probably affected length in the water. These forces acting to deflect the ship on bow or stern, would not act upon the extremities on water line, but at a reasonable distance from bow and stern. That table shows that there were currents present which were capable of giving the ship an initial sheer if not disturbed by other forces or not overcome by the rudder, which is appreciable.

At the upper left hand of the diagram I have put a little—what I call “parallelogram of velocities,” to show the effect upon
 587 the action of a ship in a canal of her proceeding against a current. That is, I am referring now to the mere geometric effect. The line X-X represents the influences of the current upon the ship by proceeding against it at the rate and direction indicated by the arrow S, with the tide running in the opposite direction at a rate and direction shown by the arrow T. Then the resultant effect upon the course of the ship would be shown by the arrow R, showing that her progress laterally across the current of the canal in either direction would have much more carrying force for a given deflection of course than if she were proceeding with the current.

Q. 26. The deflection shown on this plan was with the current, you understood? The deflection shown on this exhibit which you took this from was with the current?

A. When she was against the current.

Q. 27. The vessel was proceeding against the current, but on this exhibit the other side tried out the current; and the deflections shown on this plan were when the float was proceeding with the current.

A. The float was proceeding with the current; yes.

Q. 28. The float was proceeding with the current?

A. Yes.

Q. 29. And the boat was proceeding against the current. Then, as I understand you, the boat would be subject to still greater deflection than you found in the float, in proceeding against the current?

A. Yes.

Q. 30. Now will you tell us what the effect is of a vessel going over a shoal place in a canal, shoal water?

A. Temporarily she is in unstable steering equilibrium.

Q. 31. Have you had any experience that enables you to say how much water a vessel ought to have under her to give her proper steerageway?

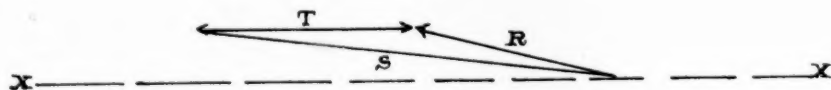
A. I couldn't make any quantitative statement.

Q. 32. Now assume that she goes over a spot that puts her in unstable equilibrium as you say, would this current be apt to affect her when she reached that?

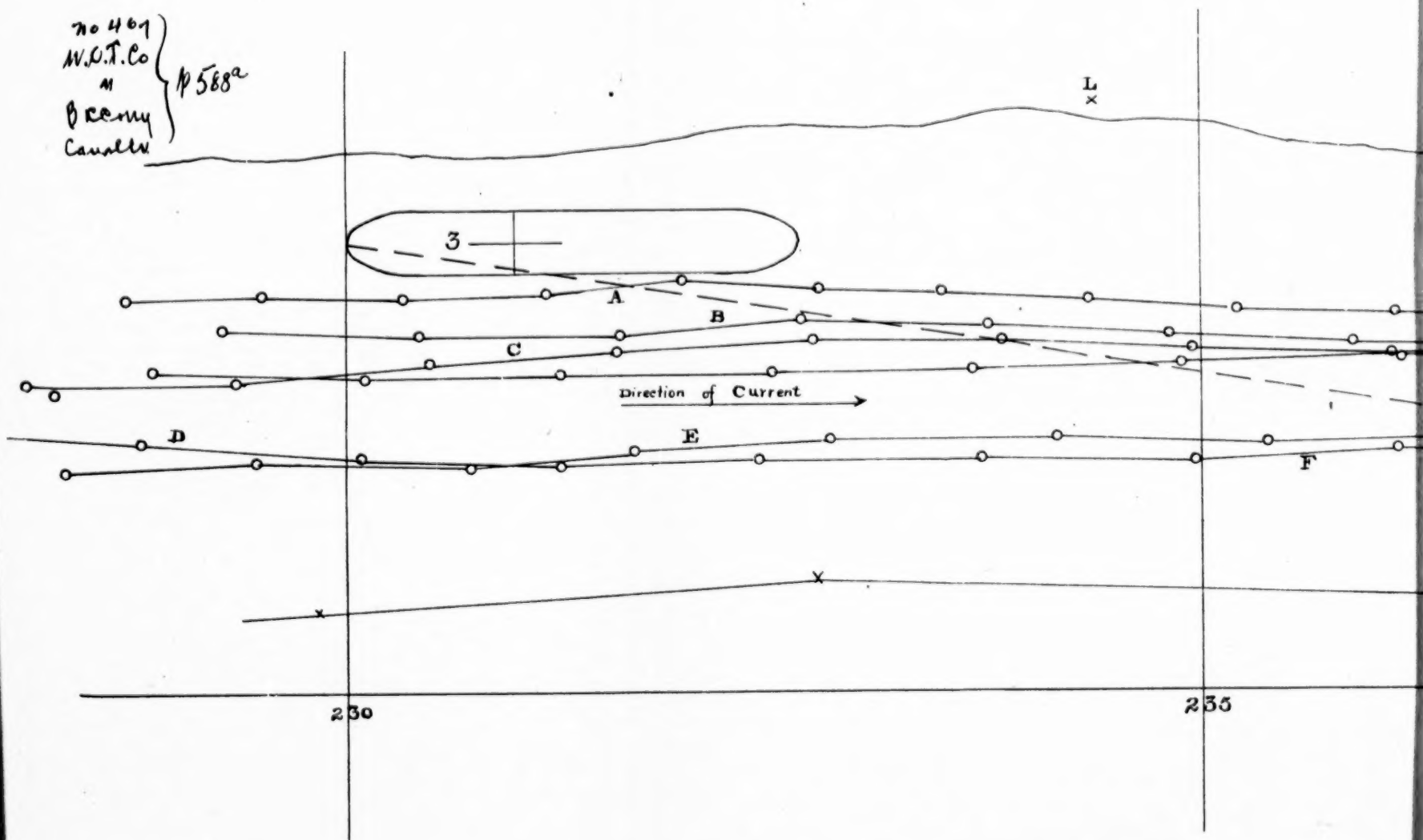
A. Yes; she would be sensitive to any deflecting force that might arise.

Q. 33. And against a head current would a sheer which the vessel would take from such deflecting force be harder to break than
 588 it would in still water or with the current?

A. It would act more quickly, and it would carry her more quickly across the canal.



no 461
 W.D.T. Co
 " } p 588a
 Penny
 Canals

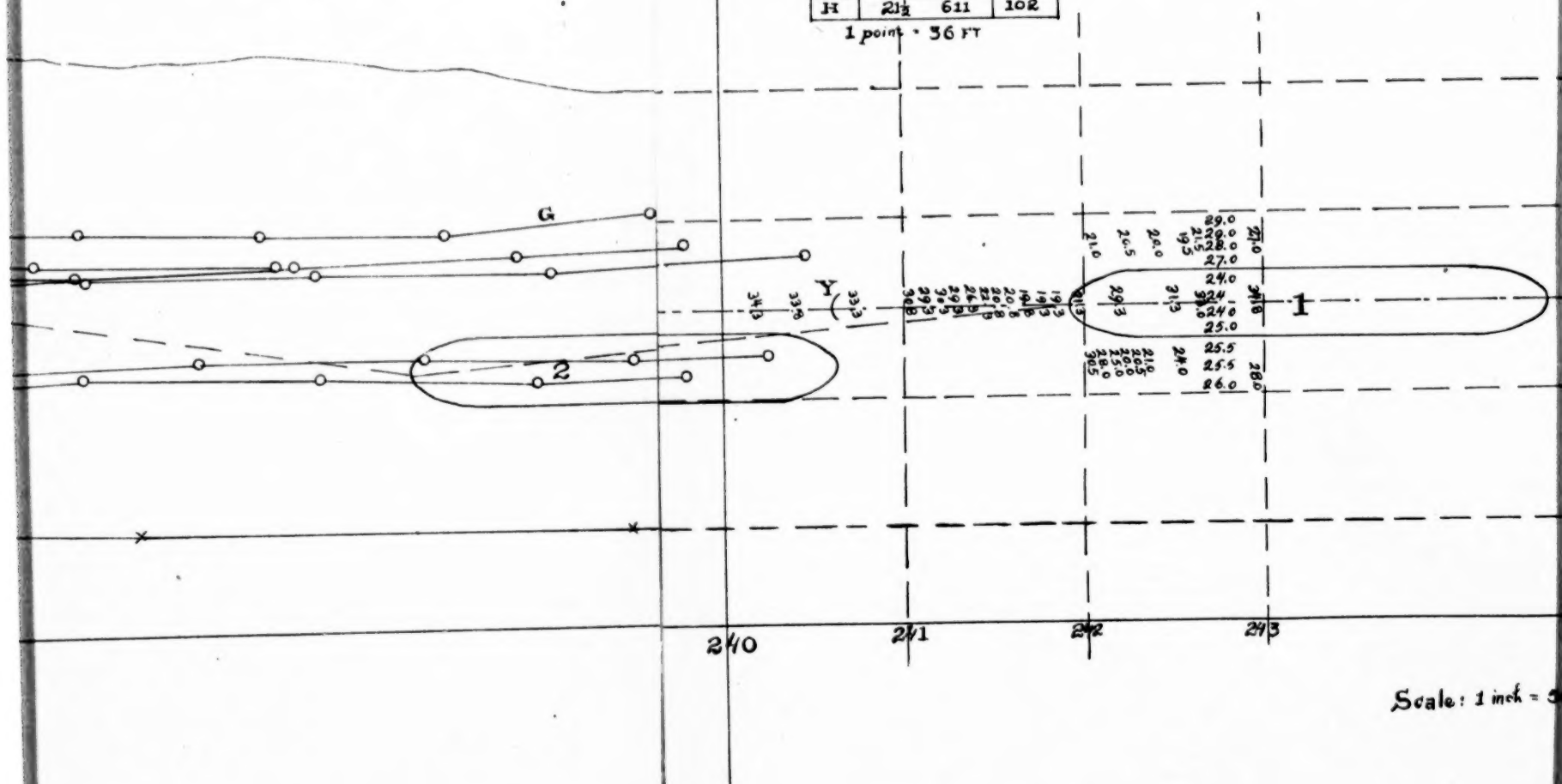


RAY PORT EXHIBIT 18

	Time for 1 point of Sheer	
	Lateral	Longial
	Seconds	
A	9 FT	78 FT
B	10	103
C	24	337
D	15	204
E	13½	211
F	8	117
G	10	115
H	21½	611

1 point = 36 FT

M
x

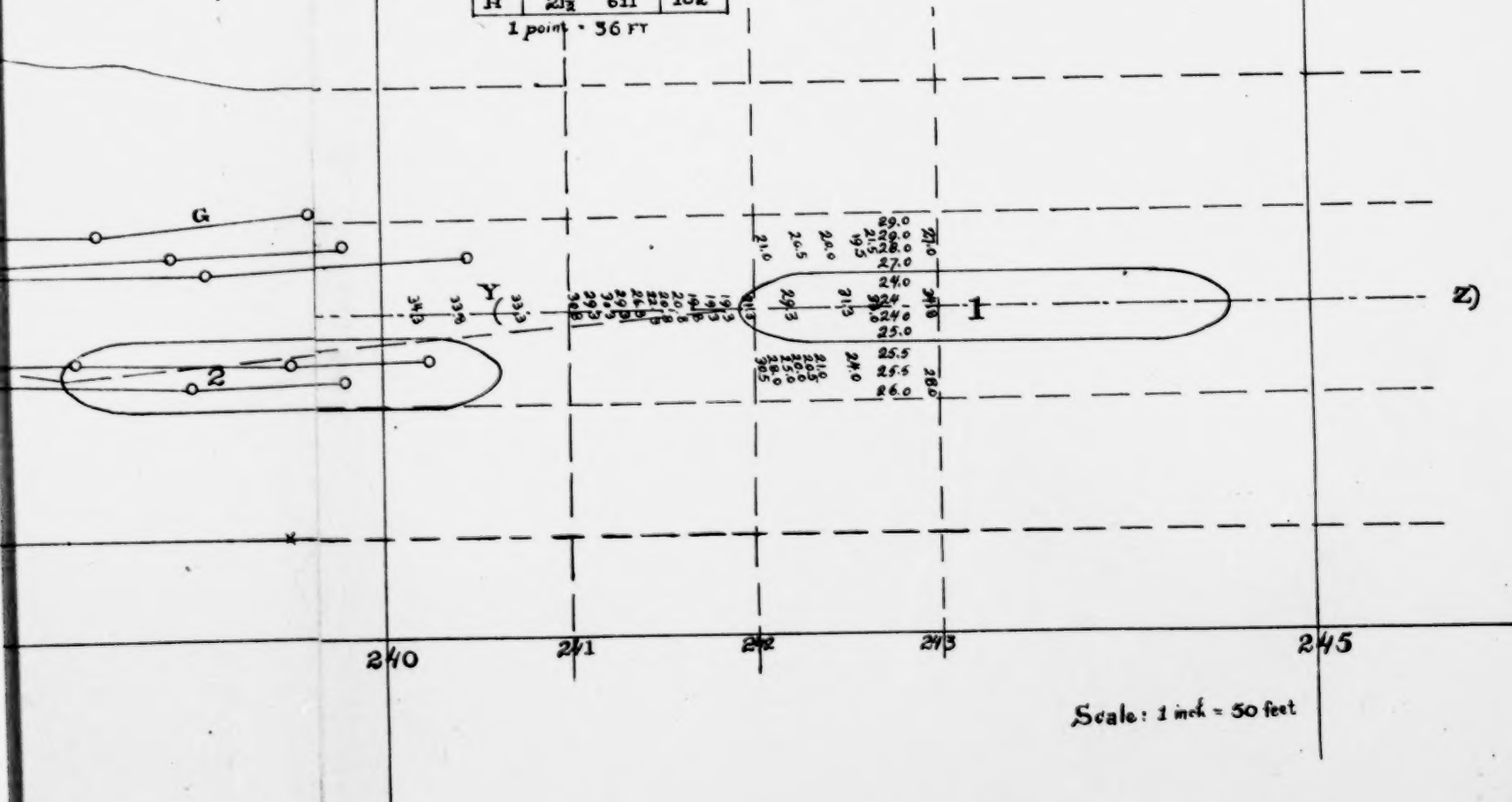


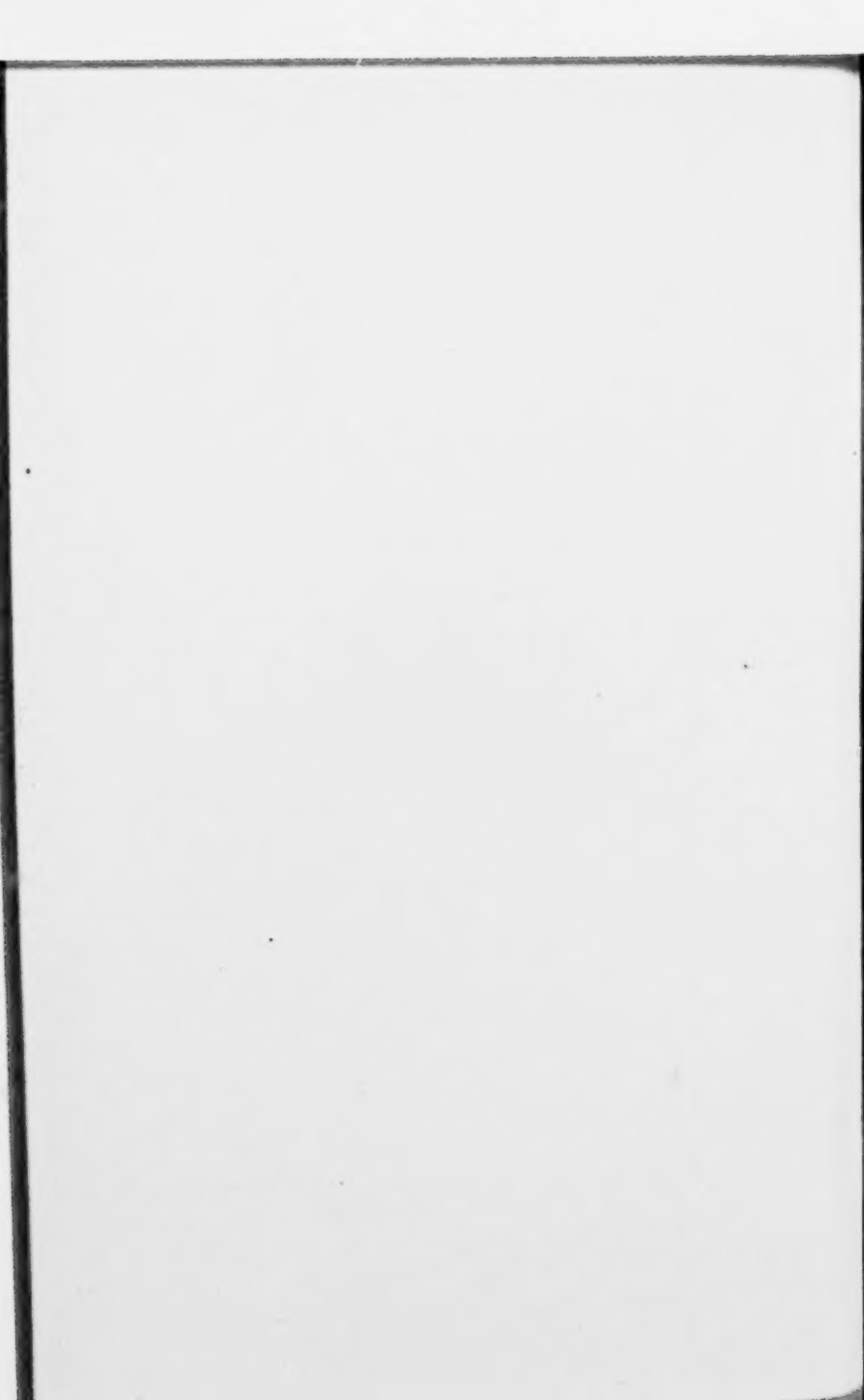
Scale: 1 inch = 30

RAY PORT EXHIBIT 18

	Lateral Long's		Time for 1 point of Sheer
	9 FT	78 FT	Seconds
A			31
B	10	103	38
C	24	337	51
D	15	204	64
E	15½	211	49
F	8	117	53
G	10	115	41
H	21½	611	102

1 point = 36 FT





Q. 34. Carry her more quickly into the bank?

A. Yes.

Q. 35. Now, what is the effect of coming from deep water on to shoal water?

A. A vessel proceeding with a given amount of power in deep water will have a speed, a natural speed, greater than when she is running in shoal water.

Q. 36. It will slow her up?

A. Well, running over a bank will slow her up, but she does not slow immediately; that is, when she runs suddenly upon the bank, her speed does not come down immediately to the natural speed for that depth of water; but during the interim she is virtually using her own inertia to throw herself out of equilibrium. It is like the case of a bicycle rider running unexpectedly off from a smooth, straight path into obstacles or into a crooked, irregular path which he might negotiate if he had foreseen it and taken it slowly, but which becomes destructive owing to his inertia which he cannot overcome immediately.

Q. 37. Now, if the Bay Port were in unstable equilibrium from going over a shoal spot, and received some force that caused her to sheer slightly to port, and then encountered one of these currents which you have shown here on this blueprint, G or H or F, in your opinion would those currents be sufficient to deflect her course to the south bank?

A. They would be sufficient to accentuate a condition already there. I have made quite hastily, since the last witness testified, a free-hand pencil diagram which will help explain that.

Mr. Blodgett: I suppose I ought to have this marked, your Honor [referring to the diagram from which the witness has previously been testifying].

[The diagram is marked as "Bay Port Exhibit 16."]

(Here follows diagram marked page 588a.)

The Witness: I had no time to have copies made of this diagram [referring to the free-hand drawing].

The Court [looking at the diagram last referred to by the witness]: The top is the water line, and this is the bottom of the ship, and this is the ground,—is that the idea?

The Witness: The three diagrams show three successive positions in the progress of the ship over a localized shoal, the bottom of the water being shown by the shaded portion, the mean sea level by the straight line; the water line on the inner side of the ship by a full line, curved; and the water line on the far side of the ship by a broken curved line. If the shoal were symmetrical under the ship, the water line on the two sides would be alike; she would be merely in unstable equilibrium, but not deflected positively either way; but if the shoal were on one side, and if she had approached one bank, then we must imagine that hump on the bottom as X as being nearer to the observer than to the ship, in which case the full line and broken water line would be different, as shown. The top diagram explains how a ship smells a bank, so to speak, when she comes near it. Her approach to the bank on that side restricts the passage of water from the bow to the stern. That means that the water must acquire a much higher velocity in order to go through, and before acquiring that velocity it has to pile up at a much higher super-elevation on the inner side of the ship at the bow. That puts a superpressure on the inner side of the bow and shoves the bow away from the bank. The second diagram shows a corresponding phenomenon when the ship has passed over a localized shoal until it is about midlength. Then we merely have a midship depression of the water, accentuated on the side toward the bank. That puts a general pressure on the outer side of the ship, shoving it towards the bank, but that is usually not enough to move the ship bodily any distance, but would explain what one of the witnesses stated as the ship "clinging to the bank." And in case the shoal were localized, the bottom diagram shows the state of affairs when the ship has passed almost over the shoal. The currents of water there have plenty of room at the forward part of the ship and so produce no difference in water level on the two sides of the ship, but towards the stern there is a deficit of waterway on the inner side that produces a depression of the full curved line. You observe on the further side the broken curved line is higher, and that throws her stern sharply into the bank. And, as the witnesses state, when she came away from the second position, she would sheer very sharply by reason of the forces as drawn in the third diagram.

590 Mr. Blodgett: I will ask to have that marked, I guess.

[The diagram last referred to is marked as "Bay Port Exhibit 17."]

Q. 38. You have explained that last free-hand drawing fully, have you now?

A. I think so. If there are any points not understood, I should be glad to clear them up.

Q. 39. Assume that the Bay Port in going over this shoal place got into a state of—what do you call it—equilibrium——

A. Unstable equilibrium.

Q. 40. Unstable equilibrium; and assume that some force caused her, when she came off there, or in coming off,—caused her to sheer to port somewhat, and assume that the helmsman's testimony is correct, that she apparently clung to the bank, and then, when his wheel was hard over, finally came off; what would you expect would be the result, with the forces that were there, as their exhibit shows,—with the current forces that are shown by the various lines?

A. She would sheer over to starboard at a rate which was large in comparison with the searoom available.

Q. 41. You have heard about a vessel going too close to a bank and sheering off. Does she sheer off more from a straight bank like a wall, or a bank at 45 degrees?

A. Well, I couldn't answer in terms on that. She sheers off to the amount that the waterway on one side is restricted relatively to the waterway on the other side of the ship.

Q. 42. In your opinion would the shoal and currents which you have found here account for the accident which happened?

A. They offer a competent explanation. I do not know just what weight you attach to the word "account."

Q. 43. Well, would they offer an explanation of the accident? That is what I mean.

A. Yes.

Q. 44. I do not mean necessarily must it have been caused by that. Might it naturally have come from that shoal?

A. Yes, to my mind, the whole of the first day's proceedings seem a very natural succession of natural forces.

Q. 45. Beginning on the shoal spot?

A. Beginning on the shoal spot at section 241 to 243.

591 Q. 46. To 243?

A. Yes.

Q. 47. And have you examined the shoal spot further down?

A. I have examined the soundings.

Q. 48. Have you examined the soundings?

A. Yes, sir.

Q. 49. And if the shoal spot at 241 to 243 was sufficient to cause such an effect, the other would be at least as bad, wouldn't it?

A. Yes; the situations are about equal. The second shoal spot is more shoal than the first, but is somewhat wider. On the other hand, it was also somewhat restricted by the barge Trilby. The situation was also accentuated the second day by the greater draft of the ship, being down by the head.

Q. 50. Now, can you tell about a vessel being down by the head,—which type of vessel would handle better, the pig type like the Bay Port or the steam type?

A. Well, as the ship was gradually trimmed by the head, the straight stemmed type becomes more sensitive in her steering more rapidly than the whaleback type.

Q. 51. Do you mean by that, would steer harder?

A. Relatively; yes.

Q. 52. Relatively. That is, of the two types of vessels by the head, the whaleback type would handle better?

A. Yes. The straight stem vessel steers apparently poorer when by the head, because her forefoot presents so much surface for lateral resistance to the water, and that increases as she goes down by the head, but in the whaleback type there is no forefoot; and when she goes down by the head there would be less increase of trouble.

Q. 53. Have you ever designed vessels?

A. I think I have performed all the computations of a naval architect, but I never pretended to be a naval architect; I have never designed vessels.

Cross-examination.

(By Mr. Pillsbury:)

X Q. 54. Does the whaleback type of boat handle as well in a narrow waterway as a straight stem?

A. I couldn't say about that.

X Q. 55. Does a current have more or less effect on the whaleback type than on the straight stem type?

A. I should think there would be no difference.

592 X Q. 56. Well, then, why can't you tell me about the comparison of the two types in a narrow waterway; what is the difficulty? I will put any element in the question that you would like to have me.

A. The trouble is, I do not wish to go outside of my experience. Your first question related to handling, and I have never handled either type of vessel of any size in a restricted waterway. My comparison to Mr. Blodgett was based purely upon the hydraulic forces on the hull, of which I am competent to speak.

X Q. 57. In order to make that statement, you have to consider the type of the boat, of course,—spoon bow and flat bottom, and all that sort of thing?

A. Yes, but that referred merely to the situation of being down by the head; I did not attempt to broaden that into a statement of comparative handling.

X Q. 58. Does a whaleback handle as well when she is down by the head as when she is up?

A. No, I would not say that.

X Q. 59. And what is the proper trim for a whaleback to handle properly?

A. Down by the stern.

X Q. 60. How much?

A. Oh, I could not state it quantitatively.

X Q. 61. Can you state it substantially?

A. No; those questions are ones that are purely of degree; the ease and reliability with which a ship handles dies gradually out as her trim changes.

X Q. 62. But what would you say was the proper trim for a whaleback of this type?

A. I should not state it quantitatively.

X Q. 63. You would not state it. Do you know anything about these boats when they were on the lake?

A. Nothing specific; I have seen them there.

X Q. 64. You do not know what loading they were built for, do you?

A. No.

X Q. 65. In making you recalculations did you assume that a tug was ahead of the steamship?

A. I made no assumption either way as to that.

X Q. 66. Well, haven't you got to make an assumption one way or the other about that in order to determine what effect these conditions would have on the Bay Port?

A. No; the conditions I have considered are merely those relating to the hull of the Bay Port itself and its passage through the water based on that.

X Q. 67. Are you assuming there was any other force at all
593 exerted in the situation?

A. No; I have assumed that she has steerageway power of her own; that may be augmented by a tug ahead.

X Q. 68. Have you assumed that it is augmented by a tug ahead in your statement on direct examination?

A. I made no assumption, because whether it was there or was not would have no bearing on the statement I made.

X Q. 69. Perhaps I did not understand you, but I thought you meant to indicate that these currents were sufficient to affect the boat to some degree.

A. Yes, and in order to explain my statement that I made no assumption as to the tugs, I should state that when these hydraulic forces, which are commonly called "suction", get to work on the hull of the ship they are universally, or all but universally, superior to any maneuvering power that she possesses or to the power of tugs. I have known them to pull a vessel with two tugs lashed alongside, one shoving her bow right across the course,—I have known the hydraulic forces to overcome the entire power of the ship's engines and those two tugs.

X Q. 70. You would not expect such force as existed here to do anything of that sort?

A. That case was on the Buffalo River, a channel somewhat similar to the Cape Cod Canal.

X Q. 71. I am more interested in this case. Would you say the force that existed here could have any such effect as that?

A. I would say this, that in the situation that arises in these cases in which these hydraulic forces get hold of the ship, both the ship's rudder and the tug would be powerless to prevent.

X Q. 72. That would be when she was on a shoal?

A. Yes, going over a shoal or so badly sheered thereby that she was in the possession of the current.

X Q. 73. Now, I wanted to get at what you meant. You spoke of hydraulic forces. Do you speak of hydraulic forces that existed on the shoal or off the shoal?

A. Primarily, those on the shoal.

X Q. 74. Now, then, let us speak of that for a moment. Have you heard the testimony in the case that they did break the sheer while she was on the shoal?

A. Yes, sir.

X Q. 75. And did that affect your conclusion at all that it
594 could not be broken?

A. No, because the effect of the shoal, as she passed over it, would be, first, to give her a sheer, and then to break that sheer.

X Q. 76. The shoal itself, you say, would break the sheer?

A. That was the purport of that very diagram, as I have just indicated.

X Q. 77. Illustrating that the shoal itself would have the effect of breaking the sheer?

A. Yes, sir.

X Q. 78. And then what effect would it have?

A. She would sheer in the opposite direction.

X Q. 79. While she is still on the shoal?

A. Yes.

X Q. 80. Then what would happen when she got off the shoal? Leaving the current out of it for the moment, just dealing with the shoal, what would happen when she got off the shoal?

A. It would no longer have any effect.

X Q. 81. Now, assume the current, as you are assuming it in the diagram, in the vicinity of where she went aground; was that any extraordinary situation; that is, any unusual situation in a waterway of this type?

A. I have not made enough measurements of that sort to speak as to that.

X Q. 82. Well, you would not say that it was, would you?

A. It does not seem to me so; no.

X Q. 83. Of course, in a narrow waterway, in a tide water canal, you are bound to have lateral currents at various places, are you not?

A. Yes. More than that, I have myself published a paper which shows that you cannot have parallel flow in a pipe or canal.

X Q. 84. Do you mind telling me what that paper is,—because I should like to look at it?

A. It was a paper submitted to the American Society of Civil Engineers about five or six years ago. I cannot give you the exact date.

X Q. 85. And when you are in such current, which is not unusual, but is a current that would be expected in a waterway of this sort, and you have a tug out ahead, and the tug is properly handled and the ship is properly handled, would you expect, if the ship was in proper trim, there would be, as a result of this current, any material sheering, any substantial sheering?

A. I should not like to answer in the form of prediction.
595 I can best explain that by saying that in my study of these cases I have systematically collected every case reported in this country and England, France and Germany, virtually all of them being in this country. The problem of the theorist is not to explain how the accidents happen, but to explain how apparently

similar conditions arise frequently and the accident does not happen.

X Q. 86. Well, perhaps that answers the question, but I am not quite clear that it does.

A. My explanation was put in to tell you why I could not answer your question requesting me to make a prediction.

X Q. 87. No, I am not asking you to make a prediction; I am asking you your opinion. You expressed to Mr. Blodgett your opinion on this matter, and now I am asking you to do it to me under the conditions that I outlined.

A. Well, what I mean to say is, that if someone had told me beforehand all the physical facts of this case, but had not told me that the ship went aground, I should not have been able to say positively that she would go aground.

X Q. 88. Would you have expected that she would?

A. I should certainly have seen danger.

X Q. 89. Would you have thought she would have gone aground if she were in proper trim?

A. I don't think I can go beyond my previous answer.

X Q. 90. Now, what other causes are there for vessels becoming unmanageable,—for vessels of this type becoming unmanageable in a narrow waterway, besides shoal spots?

A. Other vessels.

X Q. 91. Vessels of this type?

A. I mean the presence of other vessels in the waterway is the cause in most cases; in other words, the usual combination is with some other vessel and the shoal.

X Q. 92. I am eliminating the shoals for the moment.

A. Well, I think I have answered that question as well as I can.

X Q. 93. I direct your attention to the fact.—if she gets too near the bank, how will that affect her?

A. If the bank is a straight one, she will simply sheer away from it.

X Q. 94. Well, you know what sort of a bank there was
596 here, do you not?

A. Yes; but I mean if there is a continuous bank on one side which she approaches gradually, she will simply sheer away from that gently, and that will be all there will be to it.

X Q. 95. She will do that, won't she,—and that is what you call "smelling the bank"?

A. That is a very common phenomenon; yes.

X Q. 96. Now, is that sheering tendency increased if you are going around a turn?

A. That would depend entirely upon the radius of the turn.

X Q. 97. Well, I suppose the degree of the sheering would, but would it not tend to increase the sheering if you were going around any turn?

A. Of course, if a ship is making a turn, she has less margin of steerageway on one hand than she has on the other. In that sense it would accentuate the situation.

X Q. 98. Supposing you have that situation,—rounding a turn, and you have a current running three miles an hour; would the current accentuate the tendency,—running against the current?

A. I do not see any connection between the opposing current and the turn.

X Q. 99. You do not?

A. A current, rounding a turn in a channel, will, of course, develop all manner of cross-currents, and those would undoubtedly be a factor. But as to just how that would enter and how that would act, one could not say in general terms.

X Q. 100. I do not suppose you could say just how they would act, but do they affect the situation at all?

A. They might.

X Q. 101. Well, they would, would they not?

A. I should have to know the currents.

X Q. 102. You have heard the currents described at this spot by the witnesses?

A. Yes, sir.

X Q. 103. And you have seen the diagram of them?

A. The diagram?

X Q. 104. Yes, the diagram based on it. Now, assuming those currents, what would you say?

A. But these currents have no connection with any general turn of the canal so far as I have investigated. There may be a connection.

X Q. 105. I am assuming, for the moment, that there may have been a slight turn and the currents may have been there.
597 If that is so, what would you say as to the effect of those currents?

A. The effect of the currents is the effect of the currents.

X Q. 106. Well, what would the effect be?

A. What their origin might have been would have nothing to do with their effect.

X Q. 107. What would you say the effect would be under those circumstances?

A. Well, as I have testified, it might deflect the ship across the canal so far that she could not recover before striking.

X Q. 108. I think you said in your direct examination that you would expect a sudden deflection, did you not?

A. I said that would be the effect of her passing off from a localized shoal which was unsymmetrical with her course.

X Q. 109. When you say "sudden deflection," what do you mean? How far would she be likely to go in this 100-foot channel before she collided with the bank?

A. I could not make a quantitative statement. I will state this much, if it will be of any help to you, that, taking the data from these exhibits as stated, I compute that the surplus water pressure at her bow would be at least one foot. Now, it is for some navigator to say as to how quickly that superpressure on one side of her bow would deflect her.

X Q. 110. In this channel 100 feet wide you would not expect her to go out of control for a thousand or 1,200 feet, would you, without colliding with the bank?

A. Well, she is 265 feet long. A thousand feet would be between three and four ship's lengths.

X Q. 111. Yes, and in a 100-foot channel, if she is right in the middle of the channel, you can say what margin she has with her width. You know what her width was, do you not?

A. Yes; 38 feet. She would have 62 feet theoretical margin, and that on a length of 265 feet would be a deflection of about two points from her course. In other words, if she was deflected two points, she would cross the channel in her own length.

X Q. 112. If she was deflected one point?

A. Then she would cross the channel in about two lengths, which is considerably less than a thousand feet.

X Q. 113. You did not take every current that Mr. Dunbar showed on his sketch, did you, Professor Reeve?

A. I took all the currents to the right of station 230. The 598 left-hand end of his diagram is omitted from mine.

X Q. 114. You said something to the effect that you had plotted yours more accurately than his. I do not understand what you mean by that.

A. His diagram is based upon a series of point observations, and those, of course, I had to copy Chinese fashion. The lines connecting these points on his diagram are not drawn accurately from centre to centre, and they do not always bring out truly the actual deflection of current shown by the points. In my diagram I was a little more careful to do that.

X Q. 115. Well, what you mean is, that you made your line a little straighter than his; is that it? I do not know that this is important, but I thought we had better understand what you meant.

A. It becomes important only when we measure off from these observations to the scale of the diagram, which is one-fiftieth of an inch to the foot. On such a scale the width of the line becomes of importance.

X Q. 116. Indicate on your diagram what you mean as to being more accurate than he was.

A. If you will observe the diagram, you will see that the connecting lines are pretty accurately directed from centre to centre of the observations.

X Q. 117. His looked to me that way, but perhaps they are not.

A. The difference is not very great, but if one started to measure these lateral deflections from his lines, to compare them with those I have tabulated on my diagram, he might find discrepancies which were apparently justified by the lines when they were not justified by the points.

X Q. 118. We are not talking about very material discrepancies, are we?

A. Well, take position A, for instance, where I have measured a lateral deflection of nine feet. His diagram shows, by the broken line, a lateral deflection of only about seven feet,—some 20 per cent less.

X Q. 119. So that in some cases it does become of importance. Now, your evidence in relation to this matter was principally as to the

first day, with the current against the vessel. What difference, if any, would exist if the current were with the vessel?

599 A. The vessel would not depart laterally so rapidly for a given deflection of course as on the first day.

X Q. 120. And it would be easier to break the sheer and control the vessel?

A. That would depend upon other conditions.

X Q. 121. What other conditions?

A. Well, the main statements as to the form of the bottom, of which I have not such accurate information as I have on the first day.

X Q. 122. Does it make any difference as to whether a vessel will smell the bottom, as to the speed at which she is going?

A. Yes.

X Q. 123. What is the factor for that?

A. Well, all of these hydraulic forces vary roughly as the square of the speed.

X Q. 124. As the square of the speed?

A. Yes, sir.

X Q. 125. If she is drifting, with her engines quiet, what is the fact as to this suction?

A. Well, in the first place, you must remember that the propeller has virtually nothing to do with it.

X Q. 126. Then I will eliminate that from my question. If she is drifting with the current, what would you expect?

A. All of these hydraulic forces are developed by the relative motion of hull and bank or bottom or other solids, such as neighboring ships. If the current is opposing her, then we have to bring into the situation a certain volume of water which is different than if the current is moving with her. But that is a secondary consideration. The main thing is the relative motion of hull and bank.

X Q. 127. And the faster she is going, as you said, the greater the effect. Now, assuming that the boat is going over the ground at the rate of only three miles an hour, would you expect any substantial effect from these hydraulic forces?

A. It may be. Many of the reported cases of suction have involved damages to canal boats, vessels of that slow moving type, but in restricted waterways.

X Q. 128. And it would make no difference whether she was going with or against the current,—it is the speed over the bottom that is material?

A. I would not say it made no difference; but the direction of the current is a secondary factor.

X Q. 129. The current, then, does make a difference, does it?

A. Yes.

600 X Q. 130. I am not speaking of a lateral current; I am assuming it is not a lateral current.

A. Yes, sir.

X Q. 131. Now, what difference does the current make?

A. If your bank, relative to which you are measuring the ship, were a continuous one of uniform cross-section, the current would

make no difference at all; the relative displacement of water from bow to stern of the ship, relative to the bank, would be the only thing concerned. If you had a localized shoal, which is always true, more or less, then you have to bring in the current as a correcting factor. I do not know that I can state it any more clearly than that.

Mr. Pillsbury: That is all.

Redirect examination.

(By Mr. Blodgett:)

Q. 132. On your plan, I did not ask you about the letters "L" with a X under it; and "M" with an X under it. What are those,—at the top?

A. That is merely a transfer to my diagram of marks appearing upon the Canal Company's Exhibit 3, if that is the correct number, and which I did not understand, but which I transferred in case they might come up for discussion.

Q. 133. Now, you were asked something about turns in the channel,—there being turns in the channel at the place of these two accidents. Have you examined the plans and seen how much of a turn there was at either of those places?

A. Yes, I examined the map.

Q. 134. The map?

A. Yes. And that shows on the second day a turn of some 7,600 feet radius, which is far too great a radius for the turn to figure in any hydraulic action to any appreciable extent.

Q. 135. That is pretty nearly straight?

A. Virtually; yes.

Q. 136. How about the first accident?

A. Well, on the first day's accident there is shown the knuckle on the north bank, regarding which the record is contradictory so far as hydraulic evidence goes. All I can say is that, beyond that knuckle in the direction of the current, each one of these six observations shows a lateral deflection away from the knuckle. Whether that is due to the knuckle or not, I am not more competent to guess than anyone else present.

601 Q. 137. It does show that lateral deflection?

A. Each observation shows that.

Q. 138. Now, was there any curve in the canal down there where the first accident took place? Have you examined that?

A. No; the tangent begins at station 244 and continues to station 217.

Q. 139. So that in that locality the canal was practically straight?

A. It was geometrically straight.

Q. 140. Geometrically?

A. So far as the map shows.

Q. 141. If this knuckle came out into the canal more than the rest of the bank, what effect would the current have in passing that knuckle either way?

A. Water flowing in a channel is not in equilibrium, in parallel flow; it finds its equilibrium in a helical form of flow.

Q. 142. In what?

A. A corkscrew form of flow. This commonly finds expression in a number of minor eddies; it also very commonly finds itself in the form of general rotation of the entire body of water corkscrew fashion. If there were a knuckle on one bank which projected only part way down to the bottom of the canal, that would naturally tend to deflect the upper portion of the water across the canal, while there must be an underflow in the opposite direction, laterally, to correspond.

Q. 143. And on a head tide the deflection would take you before you got to the knuckle, and on the tide with you it would take you after you got by the knuckle?

A. Yes, and more than that.—only the upper half of the corkscrew current would strike the hull of a ship which had a draft of about half of the depth of the canal.

Q. 144. And what effect would that have?

A. Well, she would feel the full force of the lateral current one way, while the return current would pass near the bottom.

Mr. Blodgett: That is all.

Recross-examination.

(By Mr. Pillsbury:)

X Q. 145. Will you show me where you assume the knuckle to be, Professor Reeve?

A. At the point marked with an "X" on the north bank of the canal, about halfway between stations 230 and 235.

602 X Q. 146. What do you understand we are talking about, Professor Reeve, when we speak of a knuckle?

A. I heard it described as the remnant of a dam.

X Q. 147. Did you hear it described as going down into the water?

A. One witness has said it went into the water not over ten feet. Another witness I understand said it was entirely above mean low

X Q. 148. Assume it was not below mean low water and that it did not extend over four or five feet; would you think it would have any substantial effect as relating to a ship 265 feet long going through the canal?

A. I would not say positively that it would. It is a contributing force.

X Q. 149. Well, of course, there are a good many contributing forces; I suppose if there was a breeze that day, or anything of that sort, it would be a contributing force, but it is not a substantial element in the situation, is it; it would not appeal to you as being anything substantial?

A. I would not deny it; I would not say that it was not.

X Q. 150. Well, would you say it was, Professor Reeve?

A. I would say it easily might be, because in all of these hydraulic actions, which, as I say, are far more powerful than the maneuvering capacity of any ship, the primary deflecting force is a very small one. But we have a huge mass of water and huge mass of ship gotten into an unstable equilibrium.

X Q. 151. How far down into the water do you think such an irregularity in the bank would have to extend to substantially affect the current in the middle of the channel?

A. Well, as I have explained, it is the fact that it extends only part way down that makes it a most active cause.

X Q. 152. How far do you assume when you say "part way down"?

A. Any fraction less than half.

X Q. 153. You understand this is at the top of the slope?

A. Yes.

X Q. 154. You understand that the canal is about 200 feet wide?

A. Yes, sir; it is more than that.

603 X Q. 155. Well, at least that,—the channel is 100 feet, and the boat is in the channel and the boat is 265 feet long?

A. Yes.

X Q. 156. She has got a tug ahead of her and is under her own steam?

A. Yes.

X Q. 157. With the tide running against her at the rate you heard described, do you think that an irregularity in that bank at the top of the slope of four or five feet, which was not in the water at all at mean low water, could affect that ship at the state of the tide that existed when this accident happened?

A. Not if she were in normal condition.

Mr. Pillsbury: That is all.

Redirect examination.

(By Mr. Blodgett:)

Q. 158. If she were not,—if she were on unstable equilibrium, or had been just before that time, would it affect her, or might it?

A. Yes, it might. When I used the word "condition," I meant condition of all the circumstances involved. It is obvious that the ships are passing points like that and more severe points in channels time after time without accident; but it comes when there is a correct combination of forces to make it a serious matter.

Q. 159. On the second occasion, you know the shoal spot from the plan. Now, would the fact that the Trilby was there, a dredge,—would that have any appreciable effect upon the course of the vessel going through?

A. Yes, that would restrict the waterway somewhat. But, as it happens, the figures show that the width of the channel was beyond the normal prism at that point, so that the Trilby serves to obstruct just about as much as the extra width of the channel makes up.

Mr. Blodgett: That is all.

Mr. Pillsbury: That is all.

Mr. Blodgett: There is only one other thing that I have, your Honor, and that is I want to add to this typewritten memorandum which I showed your Honor, and which I think I read into the record, or, if not, Mr. Miller will have it, in reference to the dredges that were working there during November and December in the canal.—I simply want to add one item to that. And they
604 had no record of any other dredging than that on this paper during that time. We want to wait until Mr. Crocker comes in. But with that exception I am through.

[The complete statement as to the working of the dredges, referred to by Mr. Blodgett above, is as follows:]

"The Canal Company's records show that the lighter Trilby worked at Sagamore Beach from November 13 to 25, 1916, inclusive, and between Stations 192 and 193 from November 27 to December 16, 1916, inclusive, continuously. The page showing the above record contains the following note: 'Yardage not given but amount is limited.'

"The dredge Kennebec worked at Station 242 on December 28, 29, 30, 1916, January 1 and 2, 1917, and took out 1,350 yards in all during this time. The Federal worked from December 30, 1916, to January 3, 1917, between Station 401 and 401.50.

January 6, 1917, the Kennebec was working at 250.50."

Mr. Blodgett: I do want to offer the interrogatories and answers that we shall hand your Honor.

The Court: Yes. Then, with the exception noted, that constitutes the case for the White Oak Transportation Company?

Mr. Blodgett: For the Bay Port.

The Court: Yes; your case is in, Mr. Park?

Mr. Park: Except as I told your Honor. I asked an opportunity to look over the notes made by Captain Joseph Lewis at the time. Do you want those notes introduced? I will introduce them if you do. His report to the T. A. Scott Company is predicated on these notes, and they are almost a duplication of the other. If they want them they can have them. And then we were called upon to produce the bill of the T. A. Scott Company to the White Oak Transportation Company, and I have that here, a duplicate copy of it.

[The duplicate copy of the bill is marked as "Scott Exhibit 1."]

The Court: What about Mr. Warner's claim as representing the owner of the cargo? Are they to put in any testimony.

Mr. Blodgett: I think not, because Mr. Pillsbury agreed to the ownership and incorporation of the owner, so his formal proof
605 is made. Of course, the fact that the cargo was on board, I think, clearly appears in the evidence.

The Court: Yes, I suppose so. Have you any further evidence, Mr. Pillsbury?

Mr. Pillsbury: Yes, some,—not long.

Mr. Park: Here is a photograph which I think, your Honor, should go in with those other photographs, showing the position on the first day.

The Court: Yes.

Mr. Pillsbury: I must object to that, because I don't know anything about it; I have never seen it.

Mr. Park: I didn't know anything about any of the photographs, but they have gone in without objection.

Mr. Pillsbury: I don't know what it is supposed to represent.

Mr. Park: Then I want it to go on the record that Mr. Pillsbury objects to that photograph of the ship.

The Court: You may show it by somebody who was there and who now says it looks like it. It may go in.

[The photograph is subsequently marked as "Scott Exhibit 2."]

Mr. Pillsbury: If your Honor please, there are two depositions, one taken by Mr. Park in behalf of his client, and one taken by Mr. Blodgett in behalf of his client, which have not been introduced, and I desire to offer them.

Mr. Park: The one taken by me I have offered. My deposition has been put in.

Mr. Pillsbury: McDonald's deposition?

Mr. Park: Yes.

Mr. Pillsbury: Well, then I think you didn't read it, and I overlooked it.

Mr. Park: I did not read it, but I put it in evidence.

The Court: He handed it up to me, and I read it.

Mr. Pillsbury: That leaves only the deposition of Fanning.

Mr. Blodgett: Our deposition that we took was the deposition of a stenographer in our office who went down there with Mr. Murphy at the time of the accident and was there at the time. At the time the deposition was taken, Mr. Park had not been brought into the case, and the deposition was not taken in either the Canal Company case against the Scott Company or in our case after Mr. Park was summoned in. Therefore, it did not seem to us that it was at all competent in either of those cases against Mr. Park's client, and we have not offered it.

The Court: It would be competent as between you two.

Mr. Blodgett: It would be competent as between us, and personally I have no objection to it at all.

The Court: Mr. Park does have an objection to it?

Mr. Park: I object to it. I should have had the privilege of cross-examining this witness. There has been no privilege of cross-examination as far as we are concerned. There are some expressions there that need explanation.

The Court: I think there is no trouble with my dealing with it. I will admit it only as between the White Oak Transportation Company and the Canal Company and not as having any bearing at all on your case.

Mr. Pillsbury: That leaves me in rather an unfortunate position.

because the deposition bears principally upon the issues in the other case.

The Court: Yes,—well, I can't help that.

Mr. Pillsbury: I was going to suggest this: The first notice I had from anyone that this position was to be taken in relation to the deposition was on Saturday. It seemed to me that, inasmuch as these cases were being tried together by agreement, a deposition which existed at the time the agreement was made, unless there was some disclaimer in relation to it, should be admitted in the two cases, and I should have the privilege of offering it. But Mr. Fanning, the stenographer who gave the deposition, is at Camp Wadsworth in South Carolina. When the suggestion was made that objection would be made to the deposition, I at once set out to get him here, and with what result I do not as yet know. I hope I will have him presently. I would suggest this: I am content, if Mr. Park will waive the technical proof of the stenographic statement which he wrote out, to put in merely that statement without the rest
607 of his deposition. He testified as to his own observation in relation to what took place while he was there, in addition to the stenographic record which he made of Mr. Murphy's examination of Joseph Lewis. Now, as to that portion of it,—that stenographic record,—the only purpose of producing him is the formal proof that he took the questions and answers in shorthand, and if I could be relieved of that formal proof, then I would put in merely the stenographic record of the examination which is attached to the deposition, and omit the rest of the deposition. If I am not allowed to do that, I think that I should have some opportunity to take his deposition, because I certainly would have done so had I not supposed his evidence was covered and in the case.

Mr. Park: I did not know any such deposition had been taken until two or three days ago—I didn't know anything about it.

The Court: If I get the situation, the party against whom the deposition principally bears, the Scott Company, was not notified at all about its taking.

Mr. Pillsbury: I think, under the circumstances, I ought to be given an opportunity to take his deposition—of course notifying Mr. Park in the ordinary way.

The Court: Is there objection?

Mr. Park: I have no objection to his taking his testimony—giving us sufficient notice.

Mr. Pillsbury: I am in hopes I will have him here tomorrow, as I have taken the best steps I can to get him here, and I am hopeful that we may have him.

The Court: Of course, if he comes tomorrow there is no question at all about it, we will take his testimony. But as for delaying the arguments or delaying the decision of the case if he is not here, I shall not do it. The case has been set down for a long time; and if counsel cannot get their witnesses, I think they must go forward without them.

Mr. Pillsbury: Mr. Murphy, would you be good enough to take the stand a moment?

608 *Evidence for Boston, Cape Cod & New York Canal Company.*

FOYE M. MURPHY (sworn),

(By Mr. Pillsbury:)

Q. 1. Your full name, Mr. Murphy?

A. Foye M. Murphy.

Q. 2. On December 14, 1916, did you go to the scene of the wreck of the Bay Port?

A. I did; yes.

Q. 3. And took a stenographer in your office, Mr. Fanning, with you?

A. Yes, sir.

Q. 4. While there did you ask Joseph Lewis questions, and did he reply to the questions, and were the questions and answers taken stenographically by your stenographer?

A. I am not sure just when it was taken. I took a statement of Captain Joseph Lewis.

Q. 5. Was it either on the 13th or 14th?

A. Yes.

Q. 6. Was it after the boat went off?

A. It was after the boat went off, after both accidents.

Q. 7. Yes. Probably on the 14th?

A. I should say so; yes; although I am not sure.

Q. 8. Have you seen the stenographic notes which were written out of that examination by you of Mr. Lewis?

A. I have seen the transcript; yes.

Q. 9. And does that correspond to your recollection of what you did ask him and what he replied to your questions?

Mr. Blodgett: I object to that. They are not in evidence, and I object to your asking him if something that is not in evidence corresponds with his recollection.

Mr. Pillsbury: I am leading up to the question of putting that in evidence.

The Court: Well, yes, I do not see why not—yes, you may put that question.

A. I do not believe I could say, Mr. Pillsbury, on that, as I depended entirely on Mr. Fanning.

Q. 10. I asked you whether your recollection corresponded with his notes as to the questions you asked him and the answers that he gave?

A. That would be too big a tax on my memory. I do not believe I could say. I suppose generally it does; but I could not say absolutely everything was the same.

Q. 11. Now, you annexed the stenographic notes or had the stenographic notes annexed to the deposition which you took of Mr. Fanning?

A. Yes, sir.

Q. 12. This is the copy you furnished me of the stenographic notes. Will you please use that to refresh your recollection, and state, with its assistance, what Captain Lewis said about the accident?

A. I recall him saying that he found her on the south shore about 200 feet more or less east of where the Watuppa fetched up; he spoke about a port list, but whether those were the figures, of course I do not know; I do not hold them in memory as to whether they were 6 inches or 2 feet, or what they were; I don't know; nor what is referred to here in the second question, I could not say as to that; and I am not sure about the statement here, "Oh, I put it up to him to protect myself;" I am not sure just what he did say on that.

Q. 13. What question did you ask him?

A. "The situation about Captain Lewis taking hold?" That means William Lewis.

Q. 14. What did you ask him; what was the question?

A. That was the question: "The situation about Captain Lewis taking hold?" I think this was his reply, but I am not sure.

Q. 15. Well, what is it?

A. "Oh, I put it up to him to protect myself."

Q. 16. You think that was his reply?

A. I cannot say absolutely, Mr. Pillsbury; I think it was, but I don't know.

Q. 17. Now, go ahead and say what else he said.

A. I do recall him saying that he said to Captain William Lewis: "It is up to you; I wish you a safe and pleasant voyage." The position of the tugs I don't know anything about, Mr. Pillsbury; I cannot recall; he said the leak was in No. 2 water bottom, practically abreast No. 4 hatch.

Q. 18. You remember that he did describe the position of the tugs; you remember the fact that he described the position of the tugs?

A. I think he did; yes; I think he mentioned them; I remember him saying he heard the danger signal of four blasts on the Bay Port, and at that time he was on the Salvor, and he did not see the second striking, and I remember him describing how she
610 went down and blew the plugs out, and how she went under and spurted coal and water ten feet in the air; I remember him saying that.

The Court: "Blew the plugs out"? What did he mean by that—the plugs in the bottom?

The Witness: I think he meant the little wooden plugs in the sounding wells.

Mr. Pillsbury: That is all, thank you, Mr. Murphy.

Mr. Blodgett: Do I understand the deposition is now in as between Mr. Pillsbury and myself?

The Court: I said I would admit it.

Mr. Pillsbury: All right; I will put it in.

The Court: And if Mr. Fanning gets here tomorrow, so we need

not delay the progress of the case, of course I will take his testimony, but I shall not delay the case.

Mr. Pillsbury: I really do not think it so important since Mr. Murphy has testified.

WILLIAM T. LEWIS (recalled).

(By Mr. Pillsbury:)

Q. 398. Previous to the Bay Port coming off, had you had any conversation or been a party to any conference with relation to what should be done with the ship if she did come off?

A. No, sir.

Q. 399. Had you had any conference or talk with Captain Hammett in relation to the situation before the ship went off—any talk of any kind?

A. Yes; I had been talking with Captain Hammett on the deck of the steamer.

Q. 400. How long before she went off?

A. I couldn't say; might have been half an hour or three-quarters of an hour.

Q. 401. Previous to that had you had any talk with him in relation to the situation at all?

A. Not as I can recall, any more than when the ship first grounded, looking for a place to put a siphon or pumps in, that was all.

Q. 402. Now, this talk that you had about half an hour before she went off—what was that about?

A. Why, I couldn't say, any more than just natural talk about the ship being on the ground.

611 Q. 403. Was there anything at all in it in relation to what should be done with her after she was afloat?

A. Not that I can remember of.

Q. 404. Were any instructions given you by anybody as to taking this boat in the event of her floating and doing anything with her?

A. No, sir.

Q. 405. Now, were you here when Captain Geer testified?

A. Part of the time.

Q. 406. Captain Geer testified substantially that at the time of this accident you were head pilot and had charge in his absence—

Mr. Park: "Managing captain."

Q. 407. —managing captain, and had charge in his absence,—charge of the tugboats, was it?

Mr. Park: Charge of everything.

Q. 407. [continued]. Well, I will say "in charge." Is that a fact, Captain Lewis?

A. Up until the 1st of September.

Q. 408. Well, I say, is it a fact at the time of this accident?

A. No, sir; I did not.

Q. 409. After the 1st of September did you receive any more pay than any of the other pilots?

A. I think it was the 1st of September, or near it, that the other pilot's pay was raised equal with mine.

Mr. Blodgett: This is 1916?

Q. 410. This is 1916, is it?

A. Yes.

Q. 411. And after the formation of the Pilots' Association were the interests of the pilots pooled?

A. It was.

[No question numbered 412.]

Q. 413. And you divided the profits equally?

A. Equally.

Mr. Pillsbury: That is all.

Cross-examination.

(By Mr. Blodgett:)

X Q. 414. Captain, you said you talked with Captain Hammett about siphons some time in the night or after the vessel went on shore the first day. How did you happen to do that?

A. Why, we all got over on the ship after she had grounded, and we were all looking for a place to put a siphon into the boat.

612 X Q. 415. Whom do you mean by "all"?

A. The captains of the other three tugboats and myself and pilot Rochester.

X Q. 416. Was it any part of your duty as a pilot to take the vessel off the rocks?

A. No, sir.

X Q. 417. And you were only interested as a spectator?

A. On that certain vessel, that is all.

X Q. 418. What?

A. On that vessel, that is all I was.

X Q. 419. Didn't you see Captain Geer there that afternoon after she went on the shore?

A. Yes, sir.

X Q. 420. And didn't he tell you to get that vessel out as quick as you could?

A. He was giving me orders to pass to the tug Stuart.

X Q. 421. Didn't he tell you to get that vessel out as quick as you could?

A. No, sir.

X Q. 422. What did he say?

A. Why, he wanted to know why we didn't pull on her with the Stuart, and I made the remark that I didn't think it was any use, the tide was falling, and we couldn't pull her off.

X Q. 423. You knew he was giving that order as an officer of the Canal Company, did you not?

Mr. Pillsbury: Just a moment.

The Court: What said or done,—but not his inference.

X Q. 424. Now, at that time, I understand you,—which was in December, 1916,—you were not in the employ of the Canal Company?

A. No, sir.

X Q. 425. Are you sure about that?

A. Yes, sir.

X Q. 426. Haven't you stated that you were in the employ of the Canal Company considerably later than that?

A. I went out of the employ of the Canal Company,—supposed to be on September the 1st, but I believe it was September the 8th.

X Q. 427. 1916?

A. 1916.

X Q. 428. Haven't you stated under oath that you were in the employment of the Canal Company several months after that?

A. I went in the employ of the company again in March,—March the 1st, 1917.

X Q. 429. 1917?

A. Yes.

613 X Q. 430. And from that time did the Canal Company pay you?

A. From March the 1st until the present time.

X Q. 431. Did the Pilots' Association still pay you?

A. Up until March the 1st.

X Q. 432. They paid you just over this time of this accident?

A. They paid us from September the 8th until March the 1st.

X Q. 433. Did they pay the others the same way?

A. Three of us.

X Q. 434. So that you were only paid by the association for four months—five months?

A. That is all.

X Q. 435. Did they pay you the same rate that you were paid while the Canal Company paid you?

A. The same rates, divided equally amongst three of us.

X Q. 436. You were captain of your tug until about February, 1917, were you not, from the 10th of May, 1916?

A. I was captain of the tug, I think, until,—you mean when I went off from the tugboat?

X Q. 437. When were you on the tug?

A. From November the 15th, 1915, until May,—I think it was May the 8th or 9th, 1916.

X Q. 438. 1916?

A. Yes.

X Q. 439. And then you were a pilot from that time?

A. No; I went ashore first as manager of tugs,—master of tugs.

X Q. 440. And when did you become pilot?

A. On the 22d of May.

X Q. 441. And you were pilot up until the next February?

A. I was working for the Canal Company at the time I was master of tugs and pilot.

X Q. 442. And you remained as pilot until about the 10th of February, 1917?

A. I remained pilot for the Canal Company until about the 7th or 8th of September.

X Q. 443. You did not testify anything about going out of the employ of the Canal Company between September and February in the Chisholm case, did you?

A. I don't know as I was asked.

X Q. 444. Do you remember testifying in the Chisholm case in April, 1917, that you were a captain in the employ of the Canal Company at that time?

Mr. Pillsbury: 1917?

614 Mr. Blodgett: 1917.

A. I was captain of a tug at that time, in April.

X Q. 445. And you so testified there, did you not, that you were then in the employ of the Canal Company as captain of a tug?

A. That was April, 1917?

X Q. 446. Yes.

A. Yes; I was captain of the tug Stuart at that time.

X Q. 447. And you entered their employ as captain, you testified, in November, 1915, did you not?

A. Yes, sir.

X Q. 448. And you are still in charge of the same tug?

A. Yes, sir.

X Q. 449. Now, you said that from May, 1915, up until March, 1917, a large part of your work had been piloting vessels through the canal, did you not?

A. From May until September, or from May——

X Q. 450. From May up until "last month," that is, March, 1917, —from the May previous to March, 1917, you said a large part of your work had been piloting?

A. Up until February the 9th, I think it was.

X Q. 451. I asked you if you did not make that answer in the Chisholm case when you were on the stand?

A. I don't remember. If I did, I suppose it was right. I was piloting at that time.

X Q. 452. Do you remember being asked these questions by me on cross-examination:

"Q. Captain, you have been in the command of a tug all the time since you have been in the canal?

A. No, sir.

Q. You have not?

A. No, sir.

Q. What have been your other duties?

A. Pilot.

Q. What part of the time have you been a pilot and what part of the time master of a tug?

A. I think it was about the first of May up until the 10th of February, I think it was, that I was pilot.

Q. February of what year?

A. This year.

Q. From the 10th of May, 1916?

A. Yes.

Q. Until February, 1917?

A. Yes, sir.

Q. That you were pilot. And then did you go back to your tug?

A. Yes, sir.

Q. You were simply put in as pilot temporarily?

615 A. Why, I was taken off of the tug somewhere around the first of May,—I don't know the exact date—and was put in as pilot at that time.

Q. And kept there until February and then sent back to the tug again?

A. Yes, sir."

Were those answers true?

A. Yes, sir.

Mr. Blodgett: That is all.

Redirect examination.

(By Mr. Pillsbury:)

Q. 453. Did you mean to say that at the time in March that you went back into the Canal Company the other pilots also went into the employ of the Canal Company?

A. No, sir.

Recross-examination.

(By Mr. Park:)

X Q. 454. Were you on the deck of the Bay Port on the afternoon of the 13th when the tugs were trying to pull her from her position?

A. Part of the time.

X Q. 455. If she had come off, what did you intend to do with the Bay Port?

A. I had nothing to do with her.

X Q. 456. Who was in charge of her?

A. Her captain and pilot Rochester was both aboard.

X Q. 457. Was Rochester aboard of her?

A. Yes, sir.

X Q. 458. Now, what salary were you getting in December, 1916?

A. \$175.

X Q. 459. What were the other pilots getting?

The Court: \$175 a month?

The Witness: Yes, sir.

X Q. 460. What were the other pilots getting?

A. In December they were getting the same.

X Q. 461. \$175?

A. Yes, sir.

X Q. 462. Are you sure of that?

A. Yes, sir.

X Q. 463. For the first two or three months after the organization of this so-called association, did you get your money from the Canal Company, \$175 a month?

A. I believe they advanced it to us once or twice; we borrowed it from them,—our money didn't get collected in. But as we collected it in we paid it back.

X Q. 464. You still got your \$175 a month right along?

A. Yes, sir; until the first day of March.

616 Redirect examination.

(By Mr. Pillsbury:)

Q. 465. Well, in the event of your tolls running over that, did you get them? You got whatever your tolls were, as I understand it, did you not?

A. Yes, sir.

Q. 466. Was Captain Geer present at the meeting that we have spoken of when you formed your Pilot's Association?

A. Yes, sir.

Q. 467. Did he say anything about wanting to get some money out of it himself for acting as manager?

A. I believe he made a remark that if we made a success, had any gilt-edged bonds, we ought to pay him something, and we promised we would.

Q. 468. Do you remember his saying something about,—if there was a balance in the bank, and he had done any piloting, he would receive a share of it?

A. I heard a number of such remarks as that, but I passed them off as a joke as much as anything else.

Q. 469. Have you seen Mr. Rochester's record of the meeting?

A. Not since it was taken.

Q. 470. He acted as clerk of the meeting, did he not,—Rochester?

A. I have forgotten. I think we had a stenographer there.

Mr. Pillsbury: Well, never mind. That is all.

EDWARD R. GEER (recalled).

(By Mr. Pillsbury:)

Q. 322. Captain Geer, do you remember a boat named the Lansing that went through the canal in March, 1916?

A. I remember the boat, but I don't remember when she went through. She went through two or three times.

Q. 323. What was that boat, was she a lake-built boat?

A. She was a lake-built ship; yes.

Q. 324. Now, I was not quite clear in your evidence the other

day whether you testified that you had said that it was not safe to take big ships through, or pig. The record reads "pig" ships. Is that what you said?

A. I told Commodore Miller it was not safe——

Q. 325. Just a moment. Was it "big" or "pig" ships that you said?

A. It depends upon the kind of a ship. Probably I said——

Q. 326. Perhaps I had better direct your attention to the record. This is a mere matter of seeing whether the record got it correctly. This is the record of the examination by Mr. Blodgett:

617 "X Q. 120. Captain, after July 1st of that year, and before the accident, did you have any talks with Commodore Miller in reference to the advisability, with the canal in the condition it was, of taking through these lake-built pig barges or steamers, loaded?"

Should that be "pig"?

A. Well, "pig," yes, sir; I had a talk with him about the "pig" ships and also about these lake ships, too,—these large lake boats.

Q. 327. Why was it that you thought that it might be undesirable to take through these pig ships?

A. Well, they were kind of an awkward ship to handle they were the same as the lake ships.

Q. 328. That is, the same as this Lansing?

A. Yes, sir; they are slow, very slow ships to handle, and there isn't room enough there to handle them.

Q. 329. Does that apply to the Lansing that we have been speaking of?

A. Exactly, yes.

Q. 330. Will you see if this is a copy of a letter which you wrote Commodore Miller on March 11, 1916, please?

A. Yes, that is right. I don't say now——

Q. 331. Just a moment.

A. That is perfectly right; yes.

Mr. Pillsbury: I will offer the letter.

The Witness: That is, at the proper time,—yes, sir; at dead slack tide.

Mr. Pillsbury: Wait a moment. I haven't asked you any question. I will in a moment.

[The letter is marked as "Canal Company Exhibit 23."]

Q. 332. I want to call your attention to one portion of the letter at this time. This is dated March 11, 1916, and addressed to——

A. That——

Q. 333. Just a moment, until I read the letter. It is addressed to Commodore Miller, dated March 11, 1916, and has this statement in it: "We have had the 'Lansing' through the canal both ways this week. When she went east I went on board and took charge, piloting her myself; and I can see no reason why, if she is

handled at the proper time, she shouldn't go through the canal with perfect safety."

A. It was the——

Q. 334. Well, I will ask you now whether that represented
618 your true opinion in relation to these lake ships at that time?

A. That is, at that time I had been there a month. But after I had been on the canal for several months, then I changed my mind.

Q. 335. Wait a moment. I know you are very eager to say everything possible against me.

A. Oh, no; I don't mean to do that, sir.

Q. 336. Just answer the question. That represented your opinion at the time the letter was written, in relation to lake-built ships, did it?

A. At the proper time, and that meant exactly slack tide, yes,—at high slack; but——

Q. 337. Will you look at this letter and see if it bears your signature [passing the witness a letter]?

A. I don't see that this here—something is added here.

Q. 338. Can you disregard that.

A. That is a letter I got from Commodore Miller; yes.

Q. 339: No; this is one you wrote.

A. Yes; I mean, that is one I wrote in answer to a letter from Commodore Miller,—yes, sir.

Mr. Park: Is this in rebuttal of anything that came out, or is it a part of your case in chief?

Mr. Pillsbury: This is your witness.

Mr. Park: Well, is it in rebuttal of anything?

Mr. Pillsbury: Well, I don't know, I am sure. In these cases it is so difficult to tell when it is direct and when it is rebuttal that I am at a loss to know.

Mr. Park: Well, my witnesses have all gone.

The Court: I was making a note and did not hear the question. What was the question?

Mr. Park: My inquiry was, whether it is in rebuttal or contradicts anything that has been brought out by the Scott Company, or, as far as Mr. Blodgett is concerned, by the owner of the steamship, or not.

The Court: I had that same doubt myself.

Mr. Pillsbury: I considered it proper cross-examination.

The Court: Well, why should you do that? You are bound to make your cross-examination when the witness goes on in chief.

619 You cannot wait until the other side have put on their witnesses and excused them, and then go into it if it is objected to on that ground.

Mr. Park: I do object to it on that ground.

Mr. Pillsbury: That is all, then.

Cross-examination.

(By Mr. Park:)

X Q. 340. Captain, what was the salary of William Lewis in December, 1917?

A. \$175 a month, sir.

X Q. 341. What was the salary of the other pilots on the canal?

A. \$150, sir.

Mr. Pillsbury: I object to this because it is not any matter that I opened.

The Court: That is true, too.

Mr. Pillsbury: If we are going to be so technical, it ought to apply to both sides.

Mr. Park: I think you did,—I thought somebody brought it out.

Mr. Pillsbury: But not this witness. It was Captain Lewis.

The Court: This witness was not asked, surely, about that. I exclude that.

(By Mr. Blodgett:)

X Q. 342. Captain, you were asked in reference to the letter of March 11th, which has been offered, referring to the Lansing going through. Do you remember that in May or June after that you received information through Mr. Crocker that he had found two shoals of about 18 to 20 feet of water in depth?

A. I know I did after that, yes, sir,—I don't know how long after.

X Q. 343. And after that did you have any conversation with Commodore Miller about taking these vessels through?

A. Yes, sir; I even went as far as to send one of the Boston ships around the Cape when I didn't think there was water enough in the canal. She came to the canal, and I forbade her going through, and she went around the Cape.

X Q. 344. And you said in answer to a question of Mr. Pillsbury's that you later changed your mind about it?

A. After I had been at the canal a short time I changed my mind about the size of the vessels, and I took it up with Commodore Miller several times, and I guess the New York office has got letters and records showing I did take it up.

X Q. 345. Did the information you received from Mr. Crocker as to this 18 or 19-foot shoal have any effect on you in changing your mind?

A. Yes, sir; after he told me that, it changed my mind.

Redirect examination.

(By Mr. Pillsbury:)

Q. 346. In March, 1916, were there any shoals in the canal?

A. 1916?

Q. 347. Yes.

A. I went there around February 1st. I couldn't say,—no, I don't think there was,—no, there hadn't been any reported to me, to my knowledge; no, sir.

Q. 348. You said, I think, in answer to my question that your objection to these pig boats was that they were large and unwieldy. Was that your objection?

A. Not at all; no, sir,—not until after these shoals. If these pig ships come there at slack tide, we could take them through. But I was ordered to take them through at almost any kind of a tide, and that I objected to.

Q. 349. This is the first time you have made that statement, is it not, Mr. Geer?

A. Well, I was ordered to take the ships through, yes, sir,—not at "most any kind of a tide."

Q. 350. Were you ordered to take them through at "almost any kind of a tide"?

A. What is that, sir?

Q. 351. Were you ordered to take them through at "almost any kind of a tide"?

A. Were I ordered to take them through?

Q. 352. "At almost any kind of a tide"?

A. They ordered me to take these ships, to have them go through; I was ordered to have those ships through; and if they were delayed, then I got a letter from the New York office about it; and if I waited for slack water to take them through, I couldn't begin to do the business that they wanted me to.

Q. 353. Do I understand that you were ordered to take these ships through at any kind of a tide?

A. Not "any tide,"—not exactly those words,—but as much as—

Q. 354. That is all I asked you.

A. —but as much as to say that.

621 Mr. Pillsbury: I ask the protection of the court from this witness.

The Court: Just answer the question and then stop.

Q. 355. How soon after the time that the Bay Port entered the canal on this occasion would it have been slack water?

A. We wouldn't have had slack water, not to get that ship through that night before the Eastern Steamship Company ships came down, and we had to get that ship through so as to be sure not to hold up these Eastern steamships,—New York boats.

Q. 356. Now, at what state of the tide was it that she entered the canal?

A. It was about high water when she went on nearly in the middle of the canal. You can figure it out.

Q. 357. Do you think it is better to take a ship of that sort into the canal at high water or low water?

A. Why, it is better to take her at high water.

WILLIAM S. CROCKER (recalled).

(By Mr. Pillsbury:)

Q. 264. Mr. Crocker, here is a letter dated December 10, 1916, addressed to Captain Geer, signed by—is that your signature to it?

A. It is my name, it is not my signature.

Q. 265. Is that a letter dictated by you?

A. Yes, sir.

Q. 266. Refreshing your recollection by that letter if you see fit, will you tell us what the depth of the water was on this shoal where the Trilby was working on the 10th of December, 1916?

A. Twenty feet.

Q. 267. And that letter to Mr. Geer so states, does it?

A. Yes, sir.

Cross-examination.

(By Mr. Blodgett:)

X Q. 268. Does your letter say that on December 10th there was no place on that shoal that was less than 20 feet?

A. No, sir.

X Q. 269. As a matter of fact, you know that there was a place,—other places there that were less than 20 feet at mean low water, **do you not?**

A. I think not.

X Q. 270. From your soundings and from your plans?

A. I think not.

622 X Q. 271. Had it been taken off by that time?

A. Yes, sir; possibly on the—toward the south toe of the slope there may have been one,—a few places very near to the slope.

X Q. 272. How were you taking that sand off at that time?

A. In that locality we were taking it off with the lighter Trilby, rigged with an orange peel bucket.

X Q. 273. You were lifting it up and dropping it?

A. Lifting it up with either an orange peel or clam shell bucket.

X Q. 274. Lifting it up?

A. And putting it ashore.

X Q. 275. And putting it ashore?

A. Yes, sir.

X Q. 276. Above high water?

A. Yes, sir; most of it.

X Q. 277. And was there not a spring there which ran some of it back into the canal again?

A. Not that I know of at that time; no, sir; there was a spring there,—or a spring,—there was water coming down, which bothered us when we had the suction dredge in there some time before, and all this material was very soft mud; doubtless a little of it ran back, because we took up more or less water with it.

X Q. 278. Now, will you just read what you have got in your

letter that says you were satisfied there was nothing less than 20 feet of water on that shoal where the Trilby was at that time?

A. "This lighter has handled and put ashore about 30 cubic yards per day, and we have on this shoal almost everywhere 20 feet; that is, we have lowered the shoal 2 feet."

X Q. 279. And that is the whole of it, is it, that refreshes your recollection on that point?

A. Yes, sir; but I remember that we put the lighter in the places where there was the least water and dug on those first.

X Q. 280. And that letter is dated when?

A. December 10, 1916.

X Q. 281. December 10th. Had you taken your soundings at that time?

A. We took soundings all the time.

X Q. 282. You were taking soundings at the same time you were digging?

A. Yes.

X Q. 283. And had you taken soundings all over the width of the canal?

A. At slack water; yes, sir.

623 X Q. 284. You had reported to Mr. Geer earlier that there was less water on that shoal?

A. Yes, sir.

X Q. 285. And this was to show that you had deepened it?

A. This letter was not for that purpose; it does show that we had deepened it. The letter was to show what we were able to do with the lighter Trilby, I think, and to give an account of the work of the lighter Trilby.

Mr. Blodgett: I see. That is all.

[The following conference takes place at the judge's bench:]

Mr. Pillsbury: I have one more witness who will testify to the effect that when Mr. Geer left the canal he took the statements and letters in this Bay Port case with him; that is, he will testify that he called for the file; the file was delivered to him, and when it was returned these statements had been abstracted and have not been — since. I thought I would call that to your Honor's attention in this way rather than in open court, so that your Honor might rule as to whether that is admissible. I offer it to show his attitude toward the company, and, as a result, the bias which I claim should be attributed to his testimony.

The Court: I think it is significant on that question, and I will take it.

Redirect-examination.

(By Mr. Pillsbury:)

Q. 286. Mr. Crocker, will you state whether or not, after this accident, there was in the office of the Canal Company at Buzzard's Bay a file for this Bay Port case?

A. Yes, sir, there was.

Q. 287. And do you know where that was kept?

A. It was kept, I think, in a filing cabinet in the stenographer's room there,—either in the cabinet or in the safe,—I think in the cabinet.

Q. 288. In relation to the time Mr. Geer left the canal finally, that is, I mean bodily left it, how soon before that had you seen that file?

A. I think about a week before I had been using it.

Q. 289. How soon after he left had you occasion to look for it again?

A. I think it was the day Captain Geer left Buzzard's Bay; I am not sure,—I don't think it was the day that he left the Canal Company's office.

624 Q. 290. Did that file contain the statements of various witnesses?

A. It did; yes, sir.

Q. 291. Statements that had been taken by Commodore Miller soon after the accident?

A. Yes, sir.

Q. 292. And what else did it contain?

A. It contained, I think, also statements of the witnesses to questions that other men had asked besides Commodore Miller, and also sketches that I had made.

Q. 293. In relation to the accident?

A. In relation to the accident.

Q. 294. When you looked for it that day that he left, did you find it?

A. I did not look for it the day he left. Mr. Value looked for it the day he left.

Q. 295. Mr. Value looked for it. Well, were you there with him when he looked for it?

A. Yes, sir.

Q. 296. Was it found?

A. It was not there; no, sir.

Q. 297. What, if anything, did you do in consequence of that—well, I won't ask that question. That is all.

Recross-examination.

(By Mr. Park:)

XQ. 298. Mr. Crocker, where was this cabinet kept?

A. The cabinet was in the room on the west side of the office.

XQ. 299. The large room?

A. Yes, sir; quite a large room.

XQ. 300. A table in the centre?

A. No, sir, there was no table in the centre.

XQ. 301. Was it a room where all the pilots and captains were in the habit of congregating?

A. They were in there at times.

X Q. 302. And was it where anybody could take it that was in that room?

A. Not without the stenographer's seeing them, I think, very well.

X Q. 303. Well, it was not locked, it was not under lock and key?

A. If it was in the safe, it was locked most of the time,—not all the time, however.

X Q. 304. And if it was not in the safe, it was not locked; and it was in a room where many people were in the habit of congregating together,—in that room on the west side of your office?

A. Yes, sir.

625 X Q. 305. The superintendent's office was in another room on the northwest corner of the building, where he had his own desk?

A. Yes, sir.

(By Mr. Blodgett:)

X Q. 306. In order that there may be no misunderstanding, let me ask you this: On December 10th, while the Trilby was working, had you taken soundings to see how much you had lowered the depth, or did you figure it by the yardage that you had taken out?

A. Oh, by soundings.

X Q. 307. By soundings?

A. Yes, sir.

Mr. Blodgett: That is all.

Mr. Pillsbury: That is all with the exception of one more witness,—the one which I spoke of, and he is at Camp Ayer; and the best I can do is to get him here—he may be here at four o'clock,—I am told he will be here at four o'clock.

The Court: Very well. Then you want to take his testimony at four o'clock today or in the morning?

Mr. Pillsbury: Yes. If your Honor please, I think perhaps it would be better to take it in the morning, although I am perfectly willing to take it this afternoon if the train gets here at four.

The Court: I think it will be all right to wait until the morning; and that will close the testimony?

Mr. Blodgett: Yes.

The Court: That closes the testimony all around, does it?

Mr. Park: No; I have some.

Mr. Blodgett: I suppose if Mr. Fanning does not get here, I will have to read his deposition.

The Court: Or just hand it to me, and I will look it through.

Mr. Blodgett: Shall I do that now?

The Court: Yes, I will take that now.

[Mr. Blodgett submits and passes to the Court the deposition of Howard F. Fanning.]

Mr. Blodgett: And there is a statement which goes with it [passing the statement to the Court].

626 ARTHUR J. DALY (recalled).

(By Mr. Park:)

Q. 98. What is your name?

A. Arthur J. Daly.

Q. 99. I understood you to say in your examination that after the tug Stuart furnished you with water she went on down upon the port quarter of the Bay Port before the Bay Port came off?

A. Well, I don't think I said she furnished me with water,—I don't know in regard to furnishing me with water; but she was on the port quarter of the Bay Port when the Bay Port slid off the bank.

Q. 100. I show you this picture, and ask you if that is the situation of the Stuart when the Bay Port came off the bank, as you remember it now?

A. Yes, sir; the Salvor laying at the stern of the Stuart.

Q. 101. What is this upright that I see right to the left of the mast of the Bay Port, running up and down?

A. That would be the Salvor's mast.

Q. 102. That is the Salvor's mast?

A. As near as I can figure it.

Q. 103. Is there anything in this picture between the Stuart and the Bay Port?

A. No, sir.

Mr. Park: I offer this picture.

The Witness: The Stuart's stern may have lapped on the Salvor's starboard bow a little.

[The photograph is marked "Scott Company Exhibit 2."]

Mr. Park: That is all.

The Court: I will take the evidence of this man coming from Camp Devens tomorrow morning.

Mr. Park: I am getting Captain Geer here, because he will follow this witness whom they are going to call, if he knows anything about these missing papers.

The Court: Yes, that will close that out, and then we will go right on with the arguments.

[Adjourned to 10 a. m., March 27, 1918.]

627

Boston, Mass., March 27, 1918, 10 a. m.

CLINTON D. DAVIS (sworn).

(By Mr. Pillsbury:)

Q. 1. What is your full name?

A. Clinton D. Davis.

Q. 2. And you are now in the service?

A. Yes, sir.

Q. 3. At Camp Devens, at Ayer?

A. Yes, sir.

Q. 4. In 1916 and '17 were you in the employ of the Canal Company at Buzzard's Bay?

A. I was, sir.

Q. 5. Up to what time?

A. On or about October the 1st.

Q. 6. Of 1917?

A. 1916, sir,—'17.

Q. 7. How long had you been in the employ of the company at that time?

A. Since December the 1st, 1916.

Q. 8. What were your duties at the Canal Company office?

A. Well, I was a stenographer, had charge of the books to a certain degree,—general clerk.

Q. 9. Working under superintendent Geer?

A. Yes, sir.

Q. 10. When did Mr. Geer leave the canal?

A. The latter part of January.

Q. 11. Of 1917?

A. Yes, sir.

Q. 12. Will you state whether or not there were in the office the Canal Company files in the Bay Port and Chisholm cases?

A. There was,—there were, sir.

Q. 13. And describe what they were.

A. Well, they were testimonies of various witnesses and remarks concerning the accident to the Bay Port.

Q. 14. That is the Bay Port file?

A. Yes, sir.

Q. 15. What was in the Chisholm file?

A. Well, in the Chisholm file the major part of the papers were kept in the safe. Other papers were kept in a cabinet, filing cabinet. They were testimonies of the various witnesses and *and* other remarks and correspondence that had taken place between the Buzzard's Bay and New York offices.

Q. 16. Now, at any time in January of 1917 do you recall Captain Geer asking you to get either or both of these files for him?

A. I believe that Captain Geer, about the time of his leaving, asked me to deliver to him correspondence from the files that were
628 in any way connected with him, that had any direct bearing on him, and I delivered them to him.

Q. 17. Now as to the rest,—any other contents of the files, particularly as to the statements of witnesses, whether or not you delivered that to him at any time?

A. Yes, I delivered the testimonies of the witnesses of the Bay Port and certain testimonies of the—in regard to the Chisholm case.

Q. 18. Did you get that back from him after you delivered it to him?

A. Yes, sir; Captain Geer returned the papers to me,—part of them.

Q. 19. What did you say?

A. The files were returned to me; yes, sir.

Q. 20. When the files were returned, were statements of witnesses which you have referred to in the file?

A. I was unable to find them, sir.

Q. 21. And were you able to find them after that?

A. No, sir.

Q. 22. And does that apply to the statements of the witnesses in both the Chisholm and the Bay Port cases?

A. It does, sir.

Q. 23. Can you fix the date of that any more accurately than you have? You said it was about the time he left. How near the time he left, how many days, or any way you can fix it?

A. Well, I delivered the files to him—to Captain Geer the day before he left; and I should say that January the 28th.

Cross-examination.

(By Mr. Park:)

X Q. 24. Where were these files kept?

A. They were kept in the filing cabinet, sir, in the main office.

X Q. 25. Some of them you say were kept in the safe?

A. Certain papers in relation to the accident to the William Chisholm were kept in the safe.

X Q. 26. Who had the combination to that safe?

A. As far as I know, sir, the auditor of tolls.

X Q. 27. Who?

A. The auditor of tolls, Mr. R. J. Sherrit.

X Q. 28. Did you ever see Captain Geer open that safe in your life when it was locked?

A. No, sir.

629 X Q. 29. The cabinet that you speak of, was that kept in the room where all the pilots and captains congregated?

A. Well, they did in a certain way.

X Q. 30. Was there any other room where they congregated when they were in the canal office?

A. Yes, sir.

X Q. 31. Where?

A. There was an office between the main office where I worked and Captain Geer's office; there was also another building——

X Q. 32. I am not talking about another building, I am talking about this particular building.

A. Yes, sir.

X Q. 33. Many times there were 12 or 15 men in that same office where this cabinet was, were there not?

A. Yes, sir.

X Q. 34. The cabinet was not locked?

A. Part of the time it was, sir.

X Q. 35. Part of the time it was not?

A. Yes, sir.

X Q. 36. What was this cabinet,—simply drawers that pull out in a desk, or a cabinet in the side of the room?

A. They were these ordinary steel filing cabinets.

X Q. 37. What time did you arrive in Boston from Ayer?

A. Yesterday afternoon, sir.

X Q. 38. And where did you spend last night?

A. Yesterday afternoon I arrived in Boston about 4.45.

X Q. 39. Where did you spend last night?

A. Hotel Essex, sir.

X Q. 40. Who put you up there?

A. Oh, myself.

X Q. 41. Yourself. Do you know Mr. Coakley?

A. I met Mr. Coakley, sir, yesterday afternoon.

X Q. 42. Have any talk about this case?

A. No, sir.

X Q. 43. Not at all?

A. No, sir.

X Q. 44. He never mentioned it to you?

A. No, sir.

X Q. 45. Or what your testimony would be? He did not ask you what your testimony would be, or anything about your relation to these missing files down at Cape Cod?

A. He did not, sir.

X Q. 46. Where did he see you,—at the Hotel Essex?

A. I met Mr. Coakley at the office.

X Q. 47. Which office?

A. The office of Currier, Young & Pillsbury.

630 X Q. 48. And that is the only office at which you saw him?

A. Yes, sir,—well, I saw him last night.

X Q. 49. Well, where?

A. Hotel Essex.

X Q. 50. Was he stopping at the Essex?

A. I believe he is, sir, as far as I know.

X Q. 51. How long were you in his presence?

A. Well, I should say two and a half to three hours.

X Q. 52. And you never mentioned the case?

A. No, sir.

X Q. 53. Who else was with you besides you and Mr. Coakley?

A. Mr. Coakley's immediate family part of the time.

X Q. 54. Did you examine those files as soon as Captain Geer returned them to you?

A. I did, sir.

X Q. 55. You say that all of the files were not there?

A. I do.

X Q. 56. He asked you to give him everything connected with himself personally in these files,—everything in which he had a personal interest, did he?

A. Captain Geer asked me to deliver to him his personal correspondence and other correspondence that was in any degree concerning him.

X Q. 57. Concerning him?

A. Yes, sir.

X Q. 58. And did you do it?

A. I did, sir.

X Q. 59. And did you dig those out?

A. No, sir; I picked out—I had a personal pocket where I kept his correspondence to him—I delivered that to him; I also had a separate pocket for all papers in relation to the Bay Port case and the William Chisholm; they were all delivered to him.

X Q. 60. And did you examine those files as soon as you got them back?

A. I did, sir.

X Q. 61. What did you find was missing?

A. All of the testimony concerning the Bay Port, the testimony of the witnesses and a few other letters that were written to the New York office in relation to the accident, and the major part of the papers concerning the William Chisholm case.

X Q. 62. Did you call Captain Geer's attention to the fact that a part of the files he had returned, and that a part of them were not in the files which he handed back to you?

A. I did not, sir.

X Q. 63. Did you make a note of it anywhere?

A. I did.

631 X Q. 64. Where?

A. At that time E. R. Value was acting superintendent of the canal, and in order to cover myself I wrote him a letter, stating that I had delivered certain papers concerning the William Chisholm and Bay Port cases to the superintendent, and when the files were returned to me I was unable to find certain papers concerning it.

X Q. 65. That is the record you made. Did you make any record in any book or anywhere else showing where these papers were?

A. On these papers?

X Q. 66. No; upon the files. Did you make upon the files any record such as this: "Certain papers belonging to these files, delivered by me to Captain Geer, were not returned"?

A. No, sir.

X Q. 67. You did not?

A. Nothing of that kind; no, sir.

X Q. 68. You did not put anything in the files to show in whose possession these missing files were?

A. No, sir.

X Q. 69. All you did was—you said you wrote a letter to Mr. Value?

A. Yes, sir.

X Q. 70. Do you know of a search afterwards being made for any of these files?

A. There was, sir.

X Q. 71. By whom?

A. By me.

X Q. 72. You knew they were missing?

A. Yes, sir.

X Q. 73. So you did not look in the files for them; where did you look?

A. I looked in the stock room where the back files are kept, made a thorough search of the office, thinking perhaps they may have been mislaid.

X Q. 74. Why did you look for them when you knew they were not in the files as returned to you by Captain Geer, and they were in the files when you delivered them to Captain Geer?

A. Well, I thought that Captain Geer might have laid them down somewhere and neglected to give them back to me.

X Q. 75. Did you make any report to any of your superior officers at any time?

A. Mr. Value was acting superintendent. He was my superior, sir, I made a report to him.

X Q. 76. What kind of a report did you make to him?

A. I wrote him a letter, sir.

X Q. 77. To Mr. Value?

A. Yes.

632 X Q. 78. Oh, excuse me; it was that same one?

A. Yes.

X Q. 79. That is all you ever did? Do you know whether anybody superior to Mr. Value made an inquiry for these missing files subsequently while you were at that office?

A. No, sir.

Mr. Park: You don't know that. That is all.

(By Mr. Blodgett:)

X Q. 80. You spoke about certain statements. How many copies of those statements did you make when you wrote them?

A. I made three, sir.

X Q. 81. How many copies did you deliver to Mr. Geer, do you say, in the files?

A. One set; one complete set, sir.

X Q. 82. Where were the other sets?

A. One set was in the New York office, and I believe one set was kept by Storey, Thorndike, Palmer & Dodge.

X Q. 83. And so far as you know those copies were sent to each of those places?

A. They were, sir.

X Q. 84. By you?

A. By me.

X Q. 85. And they were sent to them before you delivered this file to Captain Geer?

A. Yes, sir.

X Q. 86. And those were complete copies of all the statements that were taken and all the testimonies that you referred to?

A. They were, sir.

Mr. Blodgett: That is all.

(By Mr. Park:)

X Q. 87. Was one of Mr. Scott's employees, Mr. Bruun, one of those parties that made statements?

A. I believe he was; I took Mr. Bruun's testimony, sir.

X Q. 88. And he was an employee of Mr. Scott's,—a diver at the canal?

A. At that time?

X Q. 89. Yes, a diver on the canal?

A. He was a diver on the canal; yes, sir.

Redirect examination.

(By Mr. Pillsbury:)

Q. 90. He was not employed by Mr. Scott at that time?

A. No, sir; I didn't say that he was, sir.

Mr. Park: Well, he was.

Q. 91. Is that the letter that Mr. Park brought out that you wrote to Mr. Value [passing the witness a letter]?

A. It is, sir.

Mr. Pillsbury: I offer it.

633 Mr. Park: I object to it.

Mr. Pillsbury: Mr. Park opened it up.

The Court: It is only admissible, of course, to corroborate the witness. It is a mere copy, is it?

Mr. Pillsbury: It is a copy; yes, sir; I take it it is a carbon copy.

Q. 92. Is it a carbon copy?

A. It is, sir.

Q. 93. Signed by you?

A. Yes, sir.

Q. 94. It says signed by "Chester B. Davis, Stenographer." Is that written by you?

A. No, sir; that is not my handwriting.

Q. 95. Well, then, was it signed by you, as a matter of fact?

A. Yes, sir; the original was.

The Court: No. It may appear that in testifying he refreshed his recollection from what he said was a copy of the letter.

Q. 96. I will ask you, then, what is the date of the letter?

A. February 8.

Q. 97. Of what year?

A. 1917.

Mr. Pillsbury: That is all.

AUGUST BELMONT (SWORD).

(By Mr. Pillsbury:)

Q. 1. Your name, Major Belmont, is what?

A. August Belmont.

Q. 2. And you are president of the Canal Company?

A. Yes, sir.

Q. 3. And were president in 1916?

A. Yes, sir.

Q. 4. In 1916 were you actively connected with the affairs of the company?

A. Yes, sir.

Q. 5. The management?

A. Yes, sir.

Q. 6. And your office was in New York?

A. Yes, sir.

Q. 7. Commodore Miller was also in the office, was he not?

A. Yes, sir.

Q. 8. Major Belmont, I want to ask you if at any time in the year 1916 Commodore Miller reported to you that Mr. Geer objected in any way to taking through the canal these so-called pigs or lake-built boats?

A. He did not.

Mr. Park: Wait a minute. I object. How does that connect with what Mr. Geer said,—whether he reported it to his superior or not?

634 The Court: How does it?

Mr. Pillsbury: Because the evidence given is that Commodore Miller said that these boats must be taken through because Mr. Belmont said the money must be earned to pay the bonds.

Mr. Park: This does not prove it. Whether Commodore Miller reported it to him does not contradict Mr. Geer in any way.

The Court: Why isn't that so?

Mr. Pillsbury: Because Mr. Belmont is brought into the matter on the evidence put in by the other side.

The Court: I exclude it.

Q. 9. Then I will ask this question, Major Belmont. Did you ever say to Commodore Miller in any form of words that these boats must go through the canal because the revenue from them or the money which would be earned from them was needed to pay the interest on the bonds?

Mr. Park: I think that is objectionable. All we know is, Commodore Miller said so to us. Whether the remark of Commodore Miller was true or untrue, has nothing to do with it; in other words, it does not contradict Captain Geer.

The Court: There is one consideration that did not occur to me. Miller is dead, and I do not remember that his evidence has been put in, has it?

Mr. Pillsbury: Not in any form.

The Court: So your witness has put something into the mouth of a dead man who is not here. In that situation, I think it is very proper to allow considerably more latitude in testing out the foundation under an alleged statement. In view of that, Mr. Pillsbury, I think I will allow the question that you put. Of course it is the same one in substance that I excluded, but you may put the question to the witness whether he gave any directions to Miller of the kind which are here in question.

Mr. Pillsbury: Will you answer the question?

A. I never gave him any such instructions.

Cross-examination.

(By Mr. Park:)

X Q. 10. Mr. Belmont, who was your secretary of the Canal Company a week ago last Sunday?

A. Mr. Maass.

635 Mr. Pillsbury: I do not know of anything opened in the direct examination in relation to that.

Mr. Park: There will be, to which I will call your Honor's attention just as soon as the witness is off the stand.

(By Mr. Blodgett:)

X Q. 11. Did you give any active orders in reference to taking vessels through the canal at any time?

A. How do you mean "at any time"?

X Q. 12. Why, at any time prior to 1917, did you give any orders yourself with reference to taking vessels through the canal?

A. I gave no orders with regard to specific vessels. I had nothing to do with the direct administration of the canal.

X Q. 13. Did you give orders for 20-foot vessels to be taken through?

A. I gave no orders of that kind.

X Q. 14. Well, what kind of orders did you give, Mr. Belmont?

A. General instructions as a result of whatever our board decided on in connection with the general management. But the management of the canal was entirely in the hands of Commodore Miller; and, under his management, was the superintendent, who was held responsible; and specific orders as to specific vessels did not come within my province.

X Q. 15. Were you consulted when the canal was declared to be opened for vessels drawing 20 feet of water?

A. There was no such,—the canal was opened by publication of a limit of draft. It was 12 feet, not 20.

X Q. 16. When you first started the canal it was 12. Later you increased it up to 15?

A. All the different changes as to what the draft could be were

decided by the management, recommended to the board, and the authority obtained.

X Q. 17. And the various increases of draft were passed upon by the board of directors each time?

A. The circulars which were to be issued were passed upon, were submitted.

X Q. 18. And the rules or regulations stating that there were 25 feet of water in the canal at mean low water were passed upon by the board when those circulars were sent out?

A. There were no such regulations, that I remember, as you speak of; but all regulations that were—all publications of that kind were usually submitted.

636 X Q. 19. To the board?

A. To the board.

X Q. 20. And passed upon by you and the board?

A. I cannot say whether they always were passed upon by the board, but usually they were submitted.

X Q. 21. Was that book marked "Bay Port Exhibit 11" passed upon by the board?

A. Oh, I do not think this was passed upon by the board, no,—nothing of that kind.

X Q. 22. Well, didn't you ever approve that?

A. I was made familiar with it, but I do not know that I gave my definite approval.

X Q. 23. You were familiar with it?

A. Yes.

X Q. 24. You knew all about it?

A. I knew all about it. I could not tell you exactly about it now.

X Q. 25. And you knew those pamphlets were given to each captain as he came into the canal, did you not?

A. I understood so.

X Q. 26. And you gave directions that they should be, did you not?

A. I gave no such directions specifically. They were within the province of the general manager to do.

X Q. 27. And, as I understand you, the circulars that were sent out from time to time giving the increased draft of vessels that were to be allowed to go through were submitted to the board and approved?

A. Well, I do not know; I won't say they were positively submitted in the form of—so as to be approved by resolution. I used to keep the board informed; and they usually did.—I think in all cases they were familiar with those notices that were sent out, and they were submitted to me also. But that was not my province to actually give an authority, although that was done, as I remember it, in probably every case; as the depth of the canal increased, why, the draft of the vessels allowed to go through increased.

X Q. 28. And, of course, your company was anxious to take as many vessels through there as they could at all times?

A. Which they could?

X Q. 29. As many as they could?

A. Please ask that more specifically.

X Q. 30. I say, your company was trying to get as many vessels to go through there as they could all the time?

A. Yes.

637 X Q. 31. Do you remember that when the canal was opened, before it was completed, there was a resolution by the board to the effect that the canal was opened, although not completed, for the purpose of getting revenue for vessels drawing 12 to 15 feet?

A. I do not remember—"for the purpose of getting revenue"?

X Q. 32. Yes.

A. I do not remember. There is no such—the general purposes of the company are to get revenue, but there is nothing in there that indicates—

X Q. 33. Well, it was opened by resolution? When it was opened, you had a resolution of your board?

A. When it was opened, we had a resolution authorizing the use of the canal and limiting the drafts of the vessels, as I remember it.

X Q. 34. And at that time you knew, and the board knew, that the canal was not completed in accordance with the statute, to the required depth and width?

A. That cannot be answered by "Yes" or "No." The canal was at the required depth long before it was officially admitted to be of the required depth.

X Q. 35. Well, it was not at the required depth all the way through, 25 feet at mean low water, was it, when you opened it?

A. Yes; it had been dredged to the required depth all the way through long before it was officially accepted, but it never was and never will be technically at the required depth at any one moment.

X Q. 36. And you knew when you opened it, did you not, that there were a lot of boulders on the banks of the canal all through the canal length?

A. We knew that boulders existed. Part of them were charted, and part of them were supposed to exist there. It was well understood that an absolutely smooth surface did not exist and never would exist. Boulders make their appearance probably there today. The bottom of the canal changes from time to time. There is no mathematical exactitude of that sort possible, never will be.

X Q. 37. And with reference to the marking of the banks you gave no directions to have any marks placed which show the deep water 100-foot channel and the banks?

Mr. Pillsbury: That is so far from any issue in this case—

The Court: Yes; Mr. Blodgett is recalling the Watuppa case.

638 Mr. Blodgett: No; but we struck on a boulder.

The Court: I do not believe there is any evidence in this case that would warrant that. Still the Court of Appeals may take a different view, so you may put in the evidence.

A. I was not the manager of the canal, and orders of that kind would not come in my province to give directly in the manner which you asked.

X Q. 38. That would be left to Commodore Miller and the superintendent?

A. Yes, sir.

Mr. Blodgett: That is all.

Mr. Pillsbury: Mr. Park called for the statement of William Lewis, and it was marked for identification. I did not put it in, so I will offer it.

Mr. Park: I thought it was put in.

Mr. Pillsbury: It was marked for identification.

Mr. Park: Consider it in.

[The statement is marked as "Canal Company Exhibit 24."]

Evidence for the T. A. Scott Company, Inc.

EDWARD R. GEER (recalled).

(By Mr. Park:)

Q. 358. Captain Geer, do you know Mr. Maass, the secretary of the Canal Company?

A. Yes, sir, very well.

Q. 359. How long have you known him?

A. A number of years.

Q. 360. Did you have an interview with him in his office the Friday preceding the commencement of the trial of this action?

A. Yes, sir.

Q. 361. Where?

A. At the office of Mr. Belmont.

Q. 362. At New York?

A. Yes, sir, at New York.

Q. 363. Who else was there?

A. Mr. Mahony.

Q. 364. You have already testified in your cross-examination that you had that conference at that office with them?

A. Yes, sir.

Q. 365. Did you further have a conference with Mr. Maass?

A. Yes, sir.

Q. 366. Will you state to the court in detail where and under what circumstances and what that conversation was?

Mr. Pillsbury: That is already in, is it not?

639 Mr. Park: What is already in?

Mr. Pillsbury: This conference at which Mr. Mahony was present.

Mr. Park: I am not asking about that; this is subsequent to that.

Mr. Pillsbury: Subsequent to that?

Mr. Park: Yes.

A. When I was captain of the Chester W. Chapin we arrived at New York about 8 o'clock in the morning, and a messenger came up to the pilot-house with a telephone message to please call up that number. Well, I was a little late and I was anxious to get away and

take the train; I was leaving home that day to come down here to this trial; had orders from Mr. Gardner to come to this trial, so I was packing my clothes; and I remember it was about half-past ten when a messenger came up again to the pilot-house or up to my room, in fact, and says: "There is somebody on the wire who would like to talk to you." I said: "All right, tell them I will be right down." I was shaving at the time, and I just put my coat on and a muffler around my neck and went down to the telephone, and he was still holding the wire, and I called up and said: "Who is it?" He said: "This is Charlie." I said: "Charlie?" He said: "Charlie Maass." He said: "When are you going home?" I said: "I expect to go on the 1 o'clock train." He said: "I would like to see you before you go." I said: "All right." He said: "I will come over." I said: "All right,—when will you be over?" He said: "I will be right over." I said: "All right, I will be up in my room." So he came over probably an hour after the message and had a talk with me. "Now," he says,—he closed the door and said: "I don't want anybody to hear this." He says, "You know too much about this affair," he says,—and he says, "We would like to give you a vacation; take a week off," he says, "and get out of the way so the other fellows can't get you." I said: "No, Charlie, I can't do that." He said: "I have got orders from Mr. Gardner to come and report down here at this court," and I said: "I wouldn't do it anyway; I am not that kind of a man, and I am sorry you judge me such." He said: "Don't feel hurt about it." And I said: "No, I won't." So we talked it over. Then he stayed there a while longer. "Now," he says, "don't mention this to anybody." Said I: "I won't, but," I said, "at the present time I am forced to do it to save my own reputation."

Q. 367. And whom did you tell of the fact of that conversation, who knew it besides you and Mr. Maass?

A. I told my sister about it; she met me at the train.

The Court: No.

Q. 368. Who knew of the conversation?

Mr. Pillsbury: Who was present?

The Court: Who was present?

The Witness: Nobody was there present.

Q. 369. How did he get down to the pier?

A. I don't know how he came to the pier.

Q. 370. How did he pass the guard on the pier?

A. He had to come by the watchman of the ship, and he probably passed three or four. Then I told one or two—

The Court: No, no.

Q. 371. Was he shown to your room by anybody? How did he get to your room on the boat?

A. I don't know whether anybody showed him up or not; but I was in the room when he came. But he had to pass the watchman,

anyhow; the dock watchman, the gangway watchman and also the saloon watchman.

Mr. Park: Your witness.

Mr. Pillsbury: No questions. I would like an opportunity of either producing Mr. Maass or taking his deposition in this matter.

The Court: Yes, you may, and I think you had better get him here. I have always regarded an attempt by a party to suppress testimony as furnishing a very strong argument against him; and my observation has been that it is seldom resorted to in a good case, although, of course, it sometimes is. And so I will hear you out on that. And I will let the arguments go forward this morning.

Mr. Pillsbury: I will call Mr. Mahony, so long as he is here, and see whether he knows anything about that.

Mr. Park: There is no charge against Mr. Mahony. Counsel had nothing to do with it.

Mr. Blodgett: Counsel had nothing to do with it.

641 The Court: That will finish the evidence. We will go forward with the arguments then. Mr. Maass is to come here to testify.

Mr. Blodgett: Captain Geer would undoubtedly have to stay here or be here.

The Court: He has told his side of the story. I do not see that he need wait. We shall have both sides then to that story.

Mr. Blodgett: I do not think that plan on the board was ever marked. I think you had better have that offered and marked, Mr. Pillsbury, for the record.

Mr. Pillsbury: All right; I will be glad to do that.

[The plan on the rack is marked as "Canal Company Exhibit 25."]

The Court: I would like to see that chart also.

Mr. Blodgett: I don't think that was introduced in evidence either.

Mr. Pillsbury: No, I don't think it was. That is not here. Have we got any chart that the Court can use?

Mr. Mahony: I think I can get one.

Mr. Pillsbury: I am told there was no chart put in, but I will send and get a chart.

Mr. Mahony: Here is one.

[The chart is submitted to the Court.]

Evidence for Boston, Cape Cod & New York Canal Company.

Boston, Mass., March 29, 1918—10 a. m.

CHARLES MAASS (sworn).

(By Mr. Pillsbury:)

Q. 1. What is your full name, Mr. Maass?

A. Charles Maass.

Q. 2. And you live in New York ?

A. Yes, sir; I live in Brooklyn.

Q. 3. You are the secretary of the Cape Cod Canal Company?

A. Yes, sir.

Q. 4. I will ask you, first, who had charge in New York of the preparation and the handling of this Bay Port case?

A. Mr. Coakley.

Q. 5. And did you have charge of it at all?

A. No, sir.

642 Q. 6. Were you present at the conference a week ago Friday in the Canal Company's office with Mr. Geer and Mr. Coakley and Mr. Mahony?

A. Yes, sir.

Q. 7. I am not going over that conference, but I merely want to ask you this: Whether Mr. Geer was told by anyone as to whether he would be wanted by us as a witness?

A. No, sir; he was not.

Q. 8. He was not told one way or the other about that?

A. No, sir.

Q. 9. Now, what, if any, instructions did Mr. Mahony give in relation to Mr. Geer after the conference?

Mr. Park: Counsel are not involved at all.

The Court: No.

Mr. Pillsbury: I understand that. I am not putting it in for that purpose. I am putting it in to show that Mr. Mahony said he did not know whether we would want Mr. Geer or not and asked Mr. Maass to keep in touch with him.

The Court: Oh, no, no; the talk between those two I exclude.

Q. 10. Then I will ask you this: Did you go to see Mr. Geer the next Sunday?

A. Yes, sir.

Q. 11. By appointment?

A. By appointment; yes, sir.

Q. 12. What was your purpose in going to see him?

A. To find out if Mr. Geer,—Captain Geer,—had been subpoenaed by the other side.

Q. 13. Did you have any other purpose than that in going to see him?

A. No, sir.

Q. 14. Did you go to see him by anyone's direction?

A. No, sir.

Q. 15. Now, Mr. Maass, will you tell us what took place when you saw him? That is, in the first place, I will call your attention to his evidence and ask you whether, when you got there, you closed the door and said: "I don't want anybody to hear this"?

A. I closed the door, but I made no such remark as that.

Q. 16. Now, will you state why you closed the door?

A. That Sunday morning was a very windy morning; and as I opened the door to the captain's room,—I knocked on the door first, and Captain Geer said: "Come in." I opened the door, and the

643 window of his room was wide open, and it created such a draft that I had to grab my hat; and I started in the door, and naturally closed the door to prevent the draft. The captain said: "Sit down." I sat down in the only chair there was there,—he had the other chair full of his grips and clothes, and I sat under the window. The captain says: "You better close this window, there is such a draft here this morning." And I said: "Yes, I think it would be a good idea." And he closed the window up to about four inches from the top.

Q. 17. Now, did you say to him, "You know too much about this affair"?

A. No, sir; I never did.

Q. 18. Did you say to him, "We would like to give you a vacation,—take a week off"?

A. No, sir; I never said that.

Q. 19. —"and get out of the way so the other fellow can't get you"?

A. No, sir; positively.

Q. 20. Did you say that in substance, in any form of words?

A. Well, I said it in a different way. I asked Captain Geer if he had been subpoenaed by the other side. He says: "No, I have not, but Mr. Park and Mr. Scott had been in," I think the previous trip or the trip before that, "and had spoken to me about the case," Geer said; and he said: "I don't like to get into these cases." And I said: "Well, if that is so, why don't you take a vacation, captain, go on your vacation? Pettigrew is coming back and will be there Monday night."

Q. 21. That is all you said?

A. That is all.

Q. 22. What further talk did you have; what did he say in reply to that, if anything?

A. Captain Geer again said,—he said: "I don't like these law suits, and I don't want to go on to Boston." He said: "Take the last case of the Chisholm; I didn't want to go on there." He said: "I don't like these cases, but," he said, "Mr. Gardner came down here and says, 'Captain, if you want to hold your job, you be in Boston.'"

Q. 23. Had he said that before you said what you just testified to?

A. He said that after,—after I asked him.

Q. 24. State what further conversation you had.

A. I had no further conversation with Captain Geer regarding this case.

644 Q. 25. Well, what conversation did you have with him about anything?

A. Why, we talked about the ice conditions on the Sound and about the stranding of the Georgia.

Q. 26. That is, general talk about matters of general interest?

A. General talk.

Q. 27. At that time, Mr. Maass, did you know whether we wanted—by that, I mean my office or Mr. Coakley managing the case for the company—did you know whether we wanted Mr. Geer as a witness or not?

A. No, sir, I did not.

Q. 28. Did you have any intention at any time of getting him to leave so that he could not be produced as a witness?

A. No, sir; that is against my principles.

Mr. Pillsbury: That is all.

Mr. Park: No questions, your Honor.

Mr. Blodgett: No questions.

The Court: That is all.

Mr. Pillsbury: I think that closes the evidence.

645 & 646

Clerk's Certificate.

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

I, James S. Allen, Clerk of the District Court of the United States for the District of Massachusetts, certify that the two volumes entitled as follows:

Volume I. Pleadings;

Volume II., Testimony;

are true copies of the record and all proceedings in the causes in admiralty entitled, No 1517. Boston, Cape Cod & New York Canal Company v. The T. A. Scott Company, Inc. No. 1518. Boston, Cape Cod & New York Canal Company v. White Oak Transportation Company. No. 1555. White Oak Transportation Co., and Northern Coal Co., v. Boston, Cape Cod & New York Canal Co., and The T. A. Scott Co., Inc., Impleaded, in said District Court determined, the Memorandums of Decisions, the Petitions for Appeal, the Assignments of Errors, the Bonds on Appeals, and the original Citations issued in said cause, with the Acknowledgments of Service thereon.

In testimony whereof, I hereunto set my hand and affix the seal of said District Court, at Boston, in said District, this twentieth day of January, A. D. 1919.

[SEAL.]

JAMES S. ALLEN,

Clerk.

647 United States Circuit Court of Appeals for the First Circuit,
October Term, 1919.

No. 1397.

BOSTON, CAPE COD & NEW YORK CANAL COMPANY, Libellant,
Appellant,

v.

THE T. A. SCOTT COMPANY, INC., Respondent, Appellee.

No. 1398.

BOSTON, CAPE COD & NEW YORK CANAL COMPANY, Libellant,
Appellant,

v.

WHITE OAK TRANSPORTATION COMPANY, Respondent, Appellee.

No. 1399.

WHITE OAK TRANSPORTATION COMPANY ET AL., Appellants,

v.

BOSTON, CAPE COD & NEW YORK CANAL COMPANY ET AL., Appellees.

Appeals from the District Court of the United States for the District
of Massachusetts.

Before Bingham, Johnson, and Anderson, JJ.

Opinion of the Court.

May 18, 1920.

JOHNSON, J.

These three cases arose out of the stranding in the Cape Cod Canal of the Bay Port, a lake built steamer of the whaleback type, 265 feet long and of 38 feet beam, which was brought to the Atlantic coast about 1905, and after some alterations was used for carrying coal between Atlantic ports.

Soon after noon on December 13, 1916, she appeared at the westerly or Wing's Neck entrance of the Cape Cod Canal loaded with 2,393 tons of coal and having a draft of eighteen feet, two inches aft and seventeen feet, eight inches forward. Her captain was Hiram W. Hammett, who had been a master mariner twenty-seven years and for four years had held a master's license for steam vessels. He had been through the canal twice with the Bay Port when unloaded but never when loaded. Upon one of those trips he had been given by the Canal Company a book containing information

in regard to the navigation of the canal and its general features, including the statement that it had a depth of twenty-five feet at mean low water.

Having obtained the necessary permission to go through the canal, she began its passage in tow of a tug and with a competent pilot.

The court below has found that neither the pilot nor the tug were so far the agents or servants of the Canal Company as to make it answerable for their negligence; that while, previous to September 1, 1916, under the authority given by its charter, it had furnished pilots and tug boats to vessels for the navigation of the canal, it then discontinued this practice and had given notice to vessel owners using the canal, including the owners of the Bay Port, that it had done so. We are satisfied with this finding.

The tide was about half ebb and running west with a velocity of about three knots when the Bay Port started to go through the canal. She had proceeded about half its length when she took a short sheer toward its north bank, which the tug boat succeeded in checking. After continuing a short distance parallel with the north bank and on the north side of the channel she sheered again toward the south bank, upon which she grounded. Assistance was summoned by her whistle and two other tugs which were used for towing through the canal came to her aid, and with them Superintendent Geer of the Canal Company. All attempts of the tugs to pull her off the bank were unsuccessful and were given up as the tide was falling.

The T. A. Scott Company, Inc., engaged in salvage operations, with an office in Boston, was notified by the agents of the
649 owners of the steamer and it sent to the canal Captain Joseph Lewis, an experienced wrecking master.

One of the regulations issued by the Canal Company provided that,—

"In the event of grounding, the canal authorities shall have the right to direct all operations for floating the vessel."

When Captain Joseph Lewis arrived Superintendent Geer turned over to him the work of getting the Bay Port afloat and ordered the tug boat captains to render him such assistance as they could. The Bay Port was kept upon the bank that night by two of the tugs, under steam, pressing her against the bank, and her pumps were kept working. The next morning a diver sent down by the Scott Company discovered a hole in her, which was plugged up and the pumping of water from her hold by her own pumps was continued. Arrangements had also been made by the Scott Company to lighten her cargo when, unexpectedly, about 10.15 A. M., she slid off the bank into the channel of the canal. The tide was then running east at about three knots an hour. The pilot who upon the day before had undertaken to pilot her through the canal was not present, but another canal pilot, Captain William T. Lewis, was upon one of the tug boats, and when the Bay Port slid off the bank he jumped from the tug aboard the steamer and ran upon her bridge with her captain, of whom he inquired if he had steam up, and being told

that he had, he directed him to start his engines full speed ahead to prevent her drifting upon the opposite bank.

When she came off the bank into deeper water she was down at the head about eighteen inches, according to Captain Hammett, and about thirty inches, according to Pilot Lewis, and had a list to port of about fifteen inches, according to the former, and about twenty-four inches according to the latter. The tide had then been flowing easterly in the canal since 6 A. M., and the Bay Port was caught by it and commenced to drift to the eastward. The three tugs with steam up were all hanging to the port side of the Bay Port, but were headed toward the west; and upon the same side about amidships was a small wrecking boat of the Scott Company. Pilot Lewis gave a command to one of the tugs to take the wrecking boat in charge, and to another to get a hawser upon the Bay Port's bow, which it did after it had turned about, and commenced to tow the Bay Port eastward. She had proceeded only about a mile when the

650 Bay Port sheered toward the north bank, and the tug being unable to break the sheer, her bow grounded heavily, her stern was swung by the current across the canal and grounded upon the south bank, causing her bow to slide off the north bank, and she rapidly filled and sank.

The allegations of negligence in the libel of the Canal Company against the Scott Company are in substance that the Scott Company did not take adequate means for holding the Bay Port to the bank after her first stranding, and that, by such failure, they permitted her to come afloat in the canal in an unsafe condition for navigation and negligently failed to be prepared to complete her passage through the canal.

The allegations of negligence in its libel against the owners of the Bay Port are that the Bay Port was allowed to enter the canal when she was difficult to steer and control and apt to become unmanageable; that they also neglected properly to care for the Bay Port while she was resting on the bank subsequent to the stranding of December 13th, and negligently suffered her to slide off the bank when she was not prepared to complete the navigation of the canal; and that they attempted to navigate the canal with a steamer which was very difficult to steer and control and apt to become unmanageable and fail to answer her helm.

The allegations of negligence in the libel of the owners of the Bay Port against the Canal Company are that the Canal Company had misrepresented the depth of water in the canal having represented in its book issued to the public in regard to the canal that it had a depth of twenty-five feet at mean low water, while in the vicinity of both strandings of the vessel there were shoals over which there was only a depth at mean low water of between eighteen and nineteen feet, and also that the canal had been so constructed that, near the place of the first stranding, there was a projection from its north bank toward its channel which had been left when the canal was constructed, and caused a current to set toward its south side when the tide was flowing from the eastward.

The learned Judge of the District Court has found that, while there was a less depth of water than twenty-five feet near the places in the canal where the two strandings occurred, there were from twenty-one to twenty-two feet of water on the shoal over which the Bay Port passed before the first stranding and twenty-three feet or more on the shoal passed over by her before the second; and that, as her greatest draft was a little over eighteen feet, the contention of her owners that she "smelled the bottom" and was caused to sheer by the shoal water was not sustained; and that, assuming that these shoals caused her to sheer, they were so far distant from the places where the vessel stranded, they were not the proximate cause of her stranding in either case, as she had passed the shoal before the first stranding by about 1,000 feet, and by about 2,000 feet before the second, and for the whole of each of these distances there was a depth of more than twenty-five feet of water in the channel. He has also found that the projection on the north bank of the canal did not reach into the channel of the canal and did not constitute any menace to navigation, that vessels constantly passed it in safety, and that the condition of the canal here did not warrant a finding of negligence against the Canal Company.

We think these findings are sustained by the evidence. The grounds on which they are based are so fully stated in the careful opinion of the learned District Judge that it is unnecessary to add anything to the reasons which he has given.

The District Court has also found that the Bay Port, when she applied for admission to the canal, was—

"a staunch vessel, properly manned, supplied and equipped. * * * She steered as well as the ordinary whaleback steamer; but vessels of that type do not handle as sharply nor as well as those of the usual deep sea model. She was deeply laden; but not so as to interfere with her ability to maneuver."

We think this finding in regard to her steering qualities, qualified as it was, that "she steered as well as the ordinary whaleback steamer," is in accord with the evidence; but this convinces us that any steamer of this type, when deeply laden, is very difficult to handle; much more so than those of "the usual deep sea model," and that even when properly trimmed and in tow of a tug she is liable to sheer. While we think the Bay Port was negligent in attempting to go through the canal, yet we also think the Canal Company was equally negligent in allowing her to enter it and that the hazard of her attempted passage was assumed by the Canal Company with full knowledge of the risk. Mr. Geer, its superintendent, testified that he had remonstrated with the officers of the canal against the admission of vessels of her type, but that he had been overruled by them.

When the narrowness of the channel of the canal is taken into consideration, it being only 100 feet wide, with sloping banks of two feet horizontal to one vertical, which were loaded with rip-rap in order to prevent their erosion, the danger in undertaking to tow

through it such a craft as the Bay Port, laden to a depth of eighteen feet, against a current of three to three and one-half knots, is apparent, as in her deeply laden condition her hull would be largely below the surface of the water and she would sheer easily and be difficult to steer. Her peculiar structure and draft must have been as well known to the superintendent of the canal as to the captain of the vessel, for he testified that he saw her as she entered the canal, and the pilot who went out to her asked her captain her draft and was informed what she drew both forward and aft and must have reported to the superintendent what he was told, as the superintendent was to pass upon her admission to the canal and she could not enter the canal without his permission. It is in evidence also that, on February 13, 1917, only two months after the stranding of the Bay Port, the Canal Company was convinced that Superintendent Geer was right in his judgment that vessels of the Bay Port's type should not be allowed to enter the canal, for it issued a circular in which it provided that—

“No vessel of the whaleback or great lakes type will be permitted to pass through the canal.”

There was no evidence that any change had been made in the canal or in vessels of the whaleback type, and this action by the Canal Company recognized a danger in their use of the canal which it either knew or should have known when, as Superintendent Geer testified, it solicited the use of the canal by vessels of the whaleback type.

While we think the Bay Port was negligent in attempting to use the canal in her deeply laden condition, we think the Canal Company was equally at fault in allowing her to use it, and that
653 neither should recover for any damage which may have been suffered by reason of her attempt to go through in the condition in which she was when she entered it, no negligence being alleged in her navigation by the pilot or the tug boat or members of her own crew. When she came afloat, however, on the morning of December 14th, her unmanageability had been largely increased. It is self-evident that a vessel down at the head eighteen inches, with a list of fifteen inches, as testified to by her captain, and with water in her hold above her cargo, would be a more unwieldy vessel to navigate than she was on the preceding day, and that in this narrow waterway with its necessary bends and a tidal current of three or four knots an hour she would be likely, in view of what had happened, to sheer badly and come into collision with the canal bank on one side or the other. While there was evidence that Superintendent Geer gave instructions on the night of December 13th to get her through the canal as quickly as possible, this instruction did not authorize an attempt to get her through in the condition in which she was after she floated.

We do not think any sudden emergency arose when she slid off the bank which was of such a character as to excuse her master from exercising the judgment which the law exacts from a master who

has in his charge a valuable ship and cargo, and which would authorize him to surrender the command of his ship in her condition to a pilot upon whose skill in navigation only he was to depend. He was not confronted with imminent danger, although his vessel was caught by the current and began to drift with it. There were three tugs at her side with steam up and all of the witnesses, including Captain Hammett, testified that it would have been possible for these tugs to hold her in the channel of the canal in deep water, or to place her at the dolphins which were only about 1,000 feet to the eastward, until she could be pumped out and her cargo adjusted, so that she might be in better condition to undertake the passage of the remainder of the canal. His reason for turning over the command of his vessel to the pilot, William Lewis, is given in the following testimony in reply to questions by the Court:

"The Court: I mean Captain William Lewis. I mean, how did pilot Lewis happen to go aboard?"

654 The Witness: Oh, pilot Lewis? That, I couldn't tell you, sir, I have no idea. All I know is, he was there, he came there in the morning, early morning.

The Court: Why were you turning over the command of your vessel to him, if you don't know why he was there?

The Witness: Well, I presume he was there to pilot the ship, of course; what I mean is, he was there to pilot the ship, of course.

The Court: No, it is not 'of course' at all. You have got to show me why he was there to pilot the ship. That is just what I want to know.

The Witness: Well, Captain Rochester was the first pilot.

The Court: Yes.

The Witness: And he was sent on some other job; and I presumed that they sent pilot Lewis in his place.

The Court: I don't care what you presumed. I want to know what happened. The fact was that pilot William Lewis showed up aboard of your vessel?

The Witness: Yes, sir.

The Court: Thereupon you turn the command of the vessel over to him when she goes afloat?

The Witness: Yes, sir; as he is pilot of the canal, sir, and I was not; I was not pilot and he was a pilot."

We think that Captain Hammett was justified in assuming that Lewis was to complete the pilotage of the Bay Port through the canal, as Rochester, the pilot of the previous day, was not present; but Lewis' duties related only to pilotage through the canal. The question of determining whether the vessel was in proper condition for navigation was not for his decision, however, but for that of Captain Hammett alone; and even with the pilot in command of the navigation of the vessel, it has been held that the captain is not to leave the whole responsibility to him. In *The Oregon*, 158 U. S. 186, the court said, at page 194:

"Nor are we satisfied with the conduct of the master in leaving the pilot in sole charge of the vessel. While the pilot doubtless super-

655 sedes the master for the time being in command of navigation of the ship, and his orders must be obeyed in all matters connected with her navigation, the master is not wholly absolved from his duties while

the pilot is aboard, and may advise with him, and even dis-
place him in case he is intoxicated or manifestly incompetent.
He is still in command of the vessel, except so far as her navigation is concerned, and bound to see that there is a sufficient watch on deck, and that the men are attentive to their duties."

The master, because of the skill and experience by which he holds his position and also by reason of his knowledge of the steering qualities of his vessel, is in a great deal better position to judge whether she is prepared to undergo the hazards of navigation under the circumstances which, in its general features, are known to him. While the pilot had more intimate knowledge of the navigation of the canal and of its currents and depth of water at different places, yet Captain Hammett knew the general characteristics of the canal, and the height and velocity of the tide. He heard, as did several other witnesses, Captain Joseph Lewis, of the Scott Company, shout to Pilot Lewis, who was upon the bridge of the Bay Port, "She is up to you." He was upon the bridge of his vessel at that time with the pilot and must be held to have assented to the turning over of the vessel by the Scott Company, and we think, as did the judge below, that it was relieved of further responsibility and that the Bay Port went forward on her own account.

While, when she entered the canal upon the previous day, we think the Canal Company assented to her navigation of the canal in the condition in which she then was, we do not find any evidence that the Canal Company assented to her undertaking the navigation of the canal in the condition in which she was when she slid off the bank: for if it be admitted, without deciding, that Pilot Lewis was in the employ of the Canal Company as a pilot at this time, or that he had general charge in the absence of Captain Geer, as the latter testified, of the tug boats in the canal, there is no evidence that he was entrusted with the duty of determining what vessels should navigate the canal, nor the condition in which a vessel should be before undertaking its navigation, nor of performing any of the duties of a superintendent of the canal.

We think it cannot be said, therefore, that the Canal Company assented that the Bay Port might attempt the navigation of the canal under the conditions in which she then was. Captain Ham-
656 mettt gave as his reason for going forward with the Bay Port in her condition that there had been a general understanding between Captain Joseph Lewis, William Lewis and himself the night before that the Bay Port should be taken through the canal as soon as she came off the bank and tied up at Sandwich, at the east end of the canal, where there was a sandy bottom upon which she could rest until the necessary repairs were made upon her.

Upon cross-examination he was asked:

"X Q. You do not recall who made the suggestion that she should be tied up at Sandwich?

A. No, I do not particularly.

X Q. Did that seem to you to be the proper thing to do?

A. I think so; yes, sir.

X Q. In the event of her floating she was to be tied up at Sandwich?

A. I think so; yes, sir,—that was the general impression."

When the Bay Port came afloat Captain Hammett testified that he followed Pilot Lewis on to her bridge; that they both arrived there about the same time, and he thus describes what occurred:

"X Q. What was the first thing you did after you got on the bridge?

A. I didn't do anything.

X Q. You just stood there?

A. Just stood there; yes, sir.

X Q. What was the first thing you observed him doing?

A. The first,—he didn't do anything except to tell me to ring up full speed ahead.

X Q. He told you to ring full speed ahead?

A. Yes, sir.

X Q. Where was the boat at that time?

A. She might have been once her length from where she struck, possibly.

X Q. How far out from the shore?

A. She had drifted out a little, just clear.

X Q. Did you do what he said?

A. Exactly; yes, sir.

X Q. Did you think that was the right thing to do?

A. I think so, sir.

X Q. Do you still think so?

A. Yes, sir."

He further testified in regard to what was said by Joseph Lewis, of the Scott Company, to Pilot William Lewis, as follows:

"X Q. Do you recall any orders given by Joseph Lewis?

A. I don't think there was only one order that I heard,—that was: 'The ship is up to you, Captain Lewis.'

X Q. You heard him say to Captain Lewis: 'The ship is up to you, Captain Lewis'?

A. Yes, 'The ship is up to you, Captain Lewis.'

657 X Q. What reply did you hear Captain Lewis make?

A. I didn't hear any reply at all; I don't know as he replied to him.

The Court: You mean pilot Lewis?

The Witness: Yes, sir, pilot Lewis."

While Captain Hammett testified that his vessel, although logier than she was the day before, handled all right for about a half mile

after she came off, Pilot Lewis described her as steering badly from the very first; that she steered a zig-zag course and was difficult to control from the time she started until she struck the bank.

The captain of the tug boat "Dalzelline," which had her in tow, testified—

"that she went from one side to the other of the canal after she came off; that she would dive from one side to the other and that this was true all the way until she struck."

The mate of the tug boat also testified that the Bay Port sheered "practically as soon as she got afloat." It is evident that a vessel of her type, in the condition in which she was, would steer badly; and this fact must have been known to Captain Hammett. Looking at the situation as it is presented by the evidence and not in the light of subsequent events, we think that he was negligent in allowing his vessel to proceed before she was pumped out and her cargo adjusted. The tide was rising and in about two hours would have been high, when there would have been slack water in the canal and its navigation made safer for a vessel of the Bay Port's type.

We are satisfied with the finding of the court that the Scott Company were relieved from all further responsibility when the vessel floated, with her captain and crew aboard and a pilot upon her deck who in the presence of the captain, assumed control of the ship.

We think the following allegation of negligence in the libel of the Canal Company against the White Oak Transportation Company is sufficiently broad to cover the attempt to navigate the Bay Port while in the canal, and that it applies to her in the condition in which she was after she slid off the bank, and is not confined to her condition when she entered the canal:

658 "(b) In that the defendant attempted to navigate the canal with a steamer which was very difficult to steer and control and apt to become unmanageable and fail to answer her helm, which fact was known to the defendant, its officers and agents, or which reasonably should have been known to it and them."

The Canal Company does not, in its answer to the libel of the owners, allege that there was any negligence on the part of the pilots or the tugs which had the steamer in tow at the time of either stranding; but we think, as we have said, that the allegation in its libel is sufficiently broad to cover the attempt to navigate the Bay Port in her disabled condition. While it is impossible to determine that she would not have stranded even if she had been in the same condition as on the previous day, yet we think the danger of her doing so was largely increased by her condition after she floated, and was one of the causes that directly contributed to her second stranding; and that, as the Canal Company had not consented to her navigation of the canal in this condition, it is entitled to recover all damage which it has suffered from her second stranding and sinking.

In No. 1397, the decree of the District Court is affirmed, and the appellee recovers its costs of appeal.

In No. 1398, the decree of the District Court is reversed, and the case is remanded to that court for further proceedings not inconsistent with this opinion; and the appellant recovers its costs of appeal.

In No. 1399, the decree of the District Court is affirmed, and the appellees recover their costs of appeal.

659 United States Circuit Court of Appeals for the First Circuit,
October Term, 1919.

No. 1399.

WHITE OAK TRANSPORTATION COMPANY et al., Appellants,

v.

BOSTON, CAPE COD & NEW YORK CANAL COMPANY et al., Appellees.

Motion of Northern Coal Company to Amend Decree.

And now comes the Northern Coal Company, the intervening petitioner and owner of the cargo of the Steamer "Bayport," and respectfully moves this Court for an amendment of its decree in this case so as to provide that the decree of the District Court in this case be reversed as to this intervening petitioner, and that this intervening petitioner be decreed to be entitled to recover its damages and costs from the Boston, Cape Cod & New York Canal Company, and that this case be remanded to the District Court for further proceedings in accordance therewith.

And in support hereof your petitioner respectfully submits to this Court:

1. That in its intervening petition its claim to recover its damages and costs from the Canal Company was based upon allegations of the negligence of the Canal Company which have been sustained by this Court, and in particular upon the Canal Company's negligence—

660

"1. In representing said canal to be safe for passage by vessels of the type and draft of said steamer Bay Port, when it was not safe" (Record, p. 123).

"4. In allowing said steamer Bay Port to navigate said canal when the latter was in places too shallow and/or rocky to permit safely said navigation" (Record, p. 123).

"11. In attempting to take said steamer Bay Port through said canal with an insufficient number of and improperly placed tugs" (Record, p. 124).

"12. In constructing, maintaining and operating said canal with sloping banks faced with rip-rap, without proper means of protection for vessels passing through said canal" (Record, p. 124).

"14. And in other respects to be shown at the trial" (Record, p. 124).

2. That said Canal Company, in its answer to your petitioner's intervening petition, expressly and specifically "admits that the groundings, damage and loss of said steamer Bay Port and of the cargo were in no respect caused by any fault or negligence on the part of the petitioner, its servants or agents" (Record, bottom p. 125).

3. That the petitioner assigned as error the holding by the District Court that the Canal Company was free from fault in the matter of the first stranding of the steamer; and in not holding that the improper condition of the bottom and sides of the canal in the vicinity of the first stranding constituted negligence on the part of the Canal Company; and in holding that the first stranding was due either to mere accident or to faulty navigation by the pilot; and in not entering a decree in favor of the intervening petitioner; and in holding that the charges of negligence against the Canal Company by the intervening petitioner had not been sustained; 661 and in not holding that the Canal Company was at fault for the canal being in an unsafe condition for navigation by the steamer; and in "not holding the canal at fault for permitting the Bay Port to enter the canal and navigate therein while the canal was in an unsafe condition for navigation by her" (Record, pp. 150-152; Intervening Petitioner's Brief, pp. 3 and 4).

4. This Court in its decision has found the Canal Company was negligent in allowing the steamer to enter the canal, "and that the hazard of her attempted passage was assumed by the Canal Company with full knowledge of the risk," and that the Canal Company was "at fault in allowing her to use it," and that the danger to whaleback vessels in their use of the canal was known, or should have been known, to the Canal Company when it solicited the use of the canal by vessels of the whaleback type; that the danger to the steamer on the first day's stranding, caused by this negligence of the Canal Company as well as by any negligence on the part of the steamer, largely increased the unmanageability of the steamer and made her a more unwieldy vessel to navigate "and likely to come into collision with the canal bank on one side or the other."

5. Even though the Canal Company did not assent on the second day to the attempted navigation of the canal in the condition in which the steamer then was, it was due to the negligence of the Canal Company that the cargo found itself on the second day in a most dangerous situation on a disabled steamer in a canal wholly unsuited and dangerous to it. It was because of that situation, due to the negligence of the Canal Company, that acts and decisions wholly foreign to the normal course of navigation, but for the presence of the steamer in the canal, were imperative. The necessity for such decisions and acts was an additional risk to which the cargo

was subjected by reason of the negligence of the Canal Company in permitting the steamer to enter the canal. If the ultimate loss happened from that very risk (*i. e.*, the erroneous decision or acting on the part of the steamer), that should not relieve the Canal Company from liability for its negligence in subjecting the innocent cargo to that risk.

NORTHERN COAL COMPANY,
By Its Proctors, WARNER, STACKPOLE & BRADLEE.

On February 11 and 12, A. D. 1919, these cases came on to be heard together, and were fully heard by the court, Honorable George H. Bingham, Honorable Charles F. Johnson and Honorable George W. Anderson, Circuit Judges, sitting.

Thereafter, to wit, on May 18, 1920, the opinion of the court (p. 647) was filed, and the following Final Decrees were entered:

United States Circuit Court of Appeals for the First Circuit, October Term, 1919.

No. 1397.

BOSTON, CAPE COD & NEW YORK CANAL COMPANY, Libellant,
Appellant,

v.

T. A. SCOTT COMPANY, INC., Respondent, Appellee.

Final Decree.

May 18, 1920.

This case came on to be heard February 11 and 12, 1919, upon the transcript of record of the District Court of the United States for the District of Massachusetts and was argued by counsel.

Upon consideration whereof, it is now, to wit, May 18, 1920, here ordered, adjudged and decreed as follows: The decree of the District Court is affirmed, and the appellee recovers its costs of appeal.

By the Court,

ARTHUR I. CHARRON,
Clerk.

United States Circuit Court of Appeals for the First Circuit, October Term, 1919.

No. 1398.

BOSTON, CAPE COD & NEW YORK CANAL COMPANY, Libellant,
Appellant,

v.

WHITE OAK TRANSPORTATION COMPANY, Respondent, Appellee.

Final Decree.

May 18, 1920.

This case came on to be heard February 11 and 12, 1919, upon the transcript of record of the District Court of the United States for the District of Massachusetts and was argued by counsel.

Upon consideration whereof, it is now, to wit, May 18, 1920, here ordered, adjudged and decreed as follows: The decree of the

District Court is reversed, and the case is remanded to that court for further proceedings not inconsistent with the opinion passed down this day, and the appellant recovers its costs of appeal.

By the Court,

ARTHUR I. CHARRON,
Clerk.

United States Circuit Court of Appeals for the First Circuit, October Term, 1919.

No. 1399.

WHITE OAK TRANSPORTATION COMPANY et al., Appellants,

v.

BOSTON, CAPE COD & NEW YORK CANAL COMPANY et al., Appellees.

Final Decree.

May 18, 1920.

This case came on to be heard February 11 and 12, 1919, upon the transcript of record of the District Court of the United States for the District of Massachusetts and was argued by counsel.

Upon consideration whereof, it is now, to wit, May 18, 1920, here ordered, adjudged and decreed as follows: The decree of the

District Court is affirmed, and the appellees recover their costs of appeal.

By the Court,

ARTHUR I. CHARRON,
Clerk.

Thereafter, to wit, on June 18, 1920, the following Order of Court was entered:

United States Circuit Court of Appeals for the First Circuit, October Term, 1919.

No. 1397.

BOSTON, CAPE COD & NEW YORK CANAL COMPANY, Libellant,
Appellant.

v.

T. A. SCOTT COMPANY, INC., Respondent, Appellee.

Order of Court.

June 18, 1920.

It is ordered that the mandate in this case be, and the same hereby is, stayed until further order of court.

By the Court,

ARTHUR I. CHARRON,
Clerk.

665 On the same day, to wit, June 18, 1920, the following Motion was filed and Order entered:

United States Circuit Court of Appeals for the First Circuit.

No. 1398.

BOSTON, CAPE COD & NEW YORK CANAL COMPANY

v.

WHITE OAK TRANSPORTATION COMPANY.

Motion for Stay of Issue of Mandate.

[Filed June 18, 1920.]

Now comes the appellee in the above-entitled cause and represents to this Honorable Court that it intends to file a petition in the Supreme Court of the United States for a writ of certiorari.

Wherefore it moves that the issue of the mandate in the above entitled cause be stayed pending the determination by said Supreme Court of appellee's petition for a writ of certiorari, or until further order of this court.

WHITE OAK TRANSPORTATION
COMPANY.

BLODGETT, JONES, BURNHAM &
BINGHAM AND EDWARD E.
BLODGETT,

Proctors.

Order of Court.

June 18, 1920.

Upon motion of appellee setting forth that it proposes to file a petition in the Supreme Court for a writ of certiorari, it is ordered that the mandate in this case be, and the same hereby is, stayed until further order of this court upon the condition that said petition is duly filed and presented within the time prescribed by the rules and practice of the Supreme Court of the United States.

By the Court,

ARTHUR I. CHARRON,
Clerk.

On the same day, to wit, June 18, 1920, the following Motion was filed and Order entered:

666 United States Circuit Court of Appeals for the First Circuit.

No. 1399.

WHITE OAK TRANSPORTATION COMPANY et al.

v.

BOSTON, CAPE COD & NEW YORK CANAL COMPANY et al.

Motion for Stay of Issue of Mandate.

[Filed June 18, 1920.]

Now comes the appellant in the above-entitled cause and represents to this Honorable Court that it intends to file a petition in the Supreme Court of the United States for a writ of certiorari.

Wherefore it moves that the issue of the mandate in the above-entitled cause be stayed pending the determination by said Supreme

Court of appellant's petition for a writ of certiorari, or until further order of this court.

WHITE OAK TRANSPORTATION
COMPANY,
By BLODGETT, JONES, BURNHAM &
BINGHAM, AND
EDWARD E. BLODGETT,
Proctors.

Order of Court.

June 18, 1920.

Upon motion of White Oak Transportation Company, appellant, setting forth that it proposes to file a petition in the Supreme Court for a writ of certiorari, it is ordered that the mandate in this case be, and the same hereby is, stayed until further order of this court upon the condition that said petition is duly filed and presented within the time prescribed by the rules and practice of the Supreme Court of the United States.

By the Court.

ARTHUR I. CHARRON,
Clerk.

On the same date, to wit, June 18, 1920, a motion to amend decree (page 659) was filed by the Northern Coal Company, and on June 19, 1920, this motion came on to be heard by the court, Honorable George H. Bingham, Honorable Charles F. Johnson and Honorable George W. Anderson, Circuit Judges, sitting.

667 United States Circuit Court of Appeals for the First Circuit.
No. 1397.

BOSTON, CAPE COD & NEW YORK CANAL COMPANY, Libellant,
Appellant,

v.

THE T. A. SCOTT COMPANY, INC., Respondent, Appellee.

No. 1398.

BOSTON, CAPE COD & NEW YORK CANAL COMPANY, Libellant,
Appellant,

v.

WHITE OAK TRANSPORTATION COMPANY, Respondent, Appellee.

No. 1399.

WHITE OAK TRANSPORTATION COMPANY et al., Appellants,

v.

BOSTON, CAPE COD & NEW YORK CANAL COMPANY et al., Appellees.

Clerk's Certificate.

I, Arthur I. Charron, Clerk of the United States Circuit Court of Appeals for the First Circuit, certify that the two volumes, entitled in the above causes, namely:

Volume I, Pleadings;

Volume II, Testimony;

this certificate being attached to each of said two volumes, contain and are a true copy of the record in said causes in said court.

In testimony whereof, I hereunto set my hand and affix the seal of said United States Circuit Court of Appeals for the First Circuit, at Boston, in said First Circuit, this twenty-ninth day of July, A. D. 1920.

[Seal of United States Circuit Court of Appeals, First Circuit.]

ARTHUR I. CHARRON,
Clerk.

668 UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the First Circuit, Greeting:

Being informed that there is now pending before you a suit in which Boston, Cape Cod & New York Canal Company is appellant,

and the T. A. Scott Company, Inc., is appellee, No. 1397; Boston, Cape Cod & New York Canal Company is appellant, and White Oak Transportation Company is appellee, No. 1398; and White Oak Transportation Company et al. are appellants, and Boston, Cape Cod & New York Canal Company et al. are appellees, No. 1399, which suit was removed into the said Circuit Court of Appeals by virtue of appeals from the District Court of the United States for the District of Massachusetts, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the fifteenth day of October, in the year of our Lord one thousand nine hundred and twenty.

JAMES D. MAHER,

Clerk of the Supreme Court of the United States.

670 [Endorsed:] File No. 27,824. Supreme Court of the United States. No. 467, October Term, 1920. White Oak Transportation Company vs. Boston, Cape Cod & New York Canal Company. Writ of certiorari.

671 United States Circuit Court of Appeals for the First Circuit.

No. 1397.

BOSTON, CAPE COD & NEW YORK CANAL COMPANY

v.

THE T. A. SCOTT COMPANY, INC.

No. 1398.

BOSTON, CAPE COD & NEW YORK CANAL COMPANY

v.

WHITE OAK TRANSPORTATION COMPANY.

No. 1399.

WHITE OAK TRANSPORTATION COMPANY (NORTHERN COAL COMPANY, Intervening Petitioner)

v.

BOSTON, CAPE COD & NEW YORK CANAL COMPANY (THE T. A. SCOTT COMPANY, INC., Impleaded).

Stipulation as to Returns.

(Filed in Circuit Court of Appeals October 26, 1920.)

It is hereby stipulated by proctors for the parties to the above entitled causes that the certified copy of the transcript of the record, now on file in the office of the Clerk of the United States Supreme Court in the following cases of the October Term, 1920: No. 467, White Oak Transportation Company v. Boston, Cape Cod & New York Canal Company, and No. 487 Northern Coal Company v. Boston, Cape Cod & New York Canal Company, shall constitute the returns of the Circuit Court of Appeals for the First Circuit to the writs of certiorari issued in said cases; and that the record and proceedings in said cases may be consolidated for hearing in the United States Supreme Court.

CURRIER, YOUNG & PILLSBURY.

*Proctors for Boston, Cape Cod &
New York Canal Company.*

BLODGETT, JONES, BURNHAM &
BINGHAM.

Proctors for White Oak Transportation Company.

WARNER, STACKPOLE &
BRADLEE.

Proctors for Northern Coal Company.

PARK & MATHISON,
Proctors for The T. A. Scott Company, Inc.

A true copy:

Attest:

[Seal of the United States Circuit Court of Appeals, First Circuit.]

ARTHUR I. CHARRON,

Clerk.

672

Return on Writ of Certiorari.

United States Circuit Court of Appeals for the First Circuit.

And now here the Judges of the United States Circuit Court of Appeals for the First Circuit make return to this writ by annexing hereto and sending herewith a stipulation between counsel for the respective parties in the cause of the Supreme Court of the United States wherein this writ of certiorari issued, "that the certified copy of the transcript of the record, now on file in the office of the Clerk of the United States Supreme Court in the following cases of the October Term, 1920: No. 467, White Oak Transportation Company v. Boston, Cape Cod & New York Canal Company, and No. 487, Northern Coal Company v. Boston, Cape Cod & New York Canal Company, shall constitute the returns of the *returns of the Circuit Court of Appeals for the First Circuit to the writs of certiorari issued in said cases.*"

In testimony whereof, I, Arthur I. Charron, Clerk of the United States Circuit Court of Appeals for the First Circuit hereto set my hand and affix the seal of said court at Boston, in said First Circuit, this twenty-sixth day of October, A. D. 1920.

[Seal of the United States Circuit Court of Appeals, First Circuit.]

ARTHUR I. CHARRON,

Clerk.

673 [Endorsed:] File No. 27,824, Supreme Court U. S., October Term, 1920. Term No. 467. White Oak Transportation Co., petitioner, vs. Boston, Cape Cod & New York Canal Company. Writ of certiorari and return. Filed Oct. 28, 1920.

674 UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the First Circuit, Greeting:

Being informed that there is now pending before you a suit in which Boston, Cape Cod & New York Canal Company is appellant, and The T. A. Scott Company, Inc., is appellee, No. 1397; Boston, Cape Cod & New York Canal Company is appellant, and White Oak

Transportation Company is appellee, No. 1398; and White Oak Transportation Company et al. are appellants, and Boston, Cape Cod & New York Canal Company et al. are appellees, No. 1399, which suit was removed into the said Circuit Court of Appeals by virtue of appeals from the District Court of the United States for the District of Massachusetts, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified

675 by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the fifteenth day of October, in the year of our Lord one thousand nine hundred and twenty.

JAMES D. MAHER,

Clerk of the Supreme Court of the United States.

676 [Endorsed:] File No. 27884. Supreme Court of the United States, October Term, 1920. No. 487. Northern Coal Company vs. Boston, Cape Cod & New York Canal Company. Writ of certiorari.

677 United States Circuit Court of Appeals for the First Circuit.

No. 1397.

BOSTON, CAPE COD & NEW YORK CANAL COMPANY

v.

THE T. A. SCOTT COMPANY, INC.

No. 1398.

BOSTON, CAPE COD & NEW YORK CANAL COMPANY

v.

WHITE OAK TRANSPORTATION COMPANY.

No. 1399.

WHITE OAK TRANSPORTATION COMPANY (NORTHERN COAL COMPANY, Intervening Petitioner)

v.

BOSTON, CAPE COD & NEW YORK CANAL COMPANY (THE T. A. SCOTT COMPANY, INC., Impleaded).

Stipulation as to Returns.

(Filed in Circuit Court of Appeals October 26, 1920).

It is hereby stipulated by proctors for the parties to the above entitled causes that the certified copy of the transcript of the record, now on file in the office of the Clerk of the United States Supreme Court in the following cases of the October Term, 1920: No. 467, White Oak Transportation Company v. Boston, Cape Cod & New York Canal Company, and No. 487 Northern Coal Company v. Boston, Cape Cod & New York Canal Company, shall constitute the returns of the Circuit Court of Appeals for the First Circuit to the writs of certiorari issued in said cases; and that the record and proceedings in said cases may be consolidated for hearing in the United States Supreme Court.

CURRIER, YOUNG & PILLSBURY,

Proctors for Boston, Cape Cod & New York Canal Company.

BLODGETT, JONES, BURNHAM &
BINGHAM,

Proctors for White Oak Transportation Company.

WARNER, STACKPOLE & BRADLEE,

Proctors for Northern Coal Company.

PARK & MATHISON,

Proctors for The T. A. Scott Company, Inc.

A true copy:

Attest:

[Seal of the United States Circuit Court of Appeals, First Circuit.]

ARTHUR I. CHARRON,
Clerk.

678

Return on Writ of Certiorari.

United States Circuit Court of Appeals for the First Circuit.

And now here the Judges of the United States Circuit Court of Appeals for the First Circuit make return to this writ by annexing hereto and sending herewith a stipulation between counsel for the respective parties in the cause in the Supreme Court of the United States wherein this writ of certiorari issued, "that the certified copy of the transcript of the record, now on file in the office of the Clerk of the United States Supreme Court in the following cases of the October Term, 1920: No. 467, White Oak Transportation Company v. Boston, Cape Cod & New York Canal Company, and No. 487, Northern Coal Company v. Boston, Cape Cod & New York Canal Company, shall constitute the returns of the Circuit Court of Appeals for the First Circuit to the writs of certiorari issued in said cases."

In testimony whereof, I, Arthur I. Charron, Clerk of said United States Circuit Court of Appeals for the First Circuit hereto set my hand and affix the seal of said court at Boston, in said First Circuit, this twenty-sixth day of October, A. D. 1920.

[Seal of the United States Circuit Court of Appeals, First Circuit.]

ARTHUR I. CHARRON,
Clerk.

679 [Endorsed:] File No. 27,844. Supreme Court U. S., October Term, 1920. Term No. 487. Northern Coal Co., petitioner, vs. Boston, Cape Cod & New York Canal Co. Writ of certiorari and return. Filed Oct. 28, 1920.

680 Supreme Court of the United States, October Term, 1920.

No. 467.

WHITE OAK TRANSPORTATION COMPANY

v.

BOSTON, CAPE COD & NEW YORK CANAL COMPANY.

No. 487.

NORTHERN COAL COMPANY

v.

BOSTON, CAPE COD & NEW YORK CANAL COMPANY.

Stipulation.

It is hereby stipulated and agreed by and between the parties in the above entitled causes that the record and proceedings in said cases may be consolidated for hearing and determination by the Supreme Court of the United States upon one record.

WHITE OAK TRANSPORTATION
COMPANY,

By EDWARD E. BLODGETT, *Proctor*.
NORTHERN COAL COMPANY,

By JOHN G. PALFREY, *Proctor*.
BOSTON, CAPE COD & NEW YORK
CANAL COMPANY,

By THOMAS H. MAHONY, *Proctor*.
THE T. A. SCOTT COMPANY, INC.,

By SAMUEL PARK, *Proctor*.

[Endorsed:] 467—27824. 487—27844. No. 467. White Oak Transportation Company v. Boston, Cape Cod & New York Canal Company. No. 487. Northern Coal Company v. Boston, Cape Cod & New York Canal Company. Stipulation.

681 [Endorsed:] File No. 27,824, etc. Supreme Court U. S. October Term, 1920. Term Nos. 467 & 487. White Oak Transportation Co., petitioner, vs. Boston, Cape Cod & New York Canal Co. Northern Coal Company, petitioner, vs. Boston, Cape Cod & New York Canal Co. Stipulation to consolidate for hearing on one record. Filed Dec. 4, 1920.



United States Circuit Court of Appeals for the First Circuit.

October Term, 1919.

No. 1399.

WHITE OAK TRANSPORTATION COMPANY et al., Appellants,

v.

BOSTON, CAPE COD & NEW YORK CANAL COMPANY et al., Appellees.

Appeal from the District Court of the United States for the District of
Massachusetts.

Before Bingham, Johnson, and Anderson, JJ.

Opinion of the Court.

On Motion to Amend Decree.

September 23, 1920.

JOHNSON, J.:

The Northern Coal Company, as the owner of the cargo of the steamer Bay Port, was an intervening petitioner in the above libel. In our opinion, filed May 18, 1920, we affirmed the decree of the District Court dismissing the libel. The Northern Coal Company filed, and has been heard upon, its motion to amend our decree of affirmation, so that the decree of the District Court shall be reversed as to it, and it be decreed to be entitled to recover its damages and costs from the Boston, Cape Cod & New York Canal Company upon the ground that its allegation of negligence against the Canal Company, to wit, that it was negligent in representing said canal to be safe for passage by vessels of the type and draft of the said steamer Bay Port, when it was not safe, was sustained by our opinion.

In discussing the liability of the owners of the Bay Port under the libel of the Canal Company against them we said:

"While we think the Bay Port was negligent in attempting to use the canal in her deeply laden condition, we think the Canal Company was equally at fault in allowing her to use it, and that neither should recover for any damage which may have been suffered by reason of her attempt to go through in the condition in which she was when she entered it."—

and we also said:

"While we think the Bay Port was negligent in attempting to go through the canal, yet we also think the Canal Company was equally negligent in allowing her to enter it and that the hazard of her at-

tempted passage was assumed by the Canal Company with full knowledge of the risk."

We were then discussing the liability of the owners of the Bay Port under the allegations of negligence in the libel of the Canal Company that they had caused a vessel of the type of the Bay Port, and laden as she was, to enter the canal; and what we then said related to the condition of the Bay Port when she entered the canal.

The Bay Port ran aground twice in the canal. We have concurred in the finding of the District Court that neither stranding was occasioned by any negligence of the Canal Company in the construction or maintenance of the canal.

The second stranding of the steamer we have found was occasioned by the negligence of the captain of the Bay Port in attempting to navigate the canal with a vessel which was partially filled with water and down by the head to such an extent that it sheered badly. We have found that the Canal Company did not consent to the navigation of the canal by the Bay Port in her then condition and that the owners of the Bay Port are liable to the Canal Company for whatever damages it may have sustained by reason of the attempted navigation by the Bay Port in her disabled condition.

We think that the Bay Port, when her hold was filled with water above her cargo and she had a bad list to port and was down by the head, was much more liable to sheer than when she entered the canal; that she had become altogether a different vessel from what she was when she entered the canal, in respect to her liability to sheer; and that it was the attempt to tow her when in this condition, when, as described by the captain of the tug boat which had her in tow, she went—

"from one side to the other of the canal after she came off; that she would dive from one side to the other and this was true all the way until she struck,"—

which was the proximate cause of her loss and of the loss of the cargo.

We see no reason why we should modify our decree and the entry must be,—

Motion denied.

ANDERSON, J. (dissenting):

This court has already found the Canal Company negligent in inviting the Bay Port into its canal, because of the probability that what did happen would happen, to wit, that the vessel would run aground. The fact that the Bay Port ran aground twice and that the second grounding might have been avoided if the captain had more accurately sensed the situation and been more careful does not seem to me to prevent the original negligence of the Canal Company from continuing an efficient and proximate cause of the loss of the cargo.

This cargo was lost because both the owners of the Bay Port and the Canal Company ought to have known that it was unsafe to try to

take it through that canal in that type of vessel. The fact that, after this dangerous enterprise had been negligently entered upon, the captain was guilty of an additional act of negligence, does not seem to me to make that additional act of negligence the sole proximate cause of the loss of the cargo.

I think the motion should be granted.

Order of Court.

September 23, 1920.

It is ordered that the motion to amend the decree, filed by the Northern Coal Company on June 18, 1920, be, and the same hereby is, denied.

By the Court,

ARTHUR I. CHARRON,

Clerk.

Stipulation.

[Filed September 29, 1920.]

Whereas a final decree was on May 18, 1920, entered by the Circuit Court of Appeals in case No. 1399, White Oak Transportation Company v. Boston, Cape Cod & New York Canal Company, and petitions for writ of certiorari with briefs and the record of the case were duly filed in the United States Supreme Court by the White Oak Transportation Company and by the intervening petitioner, Northern Coal Company, and

Whereas subsequent to the entry of the final decree there was filed by the said intervening petitioner a motion to amend the said decree, which motion was determined on September 23, 1920, and

Whereas the effect of the said motion and order thereon may be to postpone the operation of the final decree to September 23, 1920, and thus render proceedings heretofore taken for writ of certiorari in said case premature,

Now, therefore, it is hereby stipulated and agreed by and between the parties hereto that if it be determined that the effect of said motion and order thereon was to postpone the operation of the final decree to September 23, 1920, the petitions for writ of certiorari with briefs and the record in case No. 1399, White Oak Transportation Company v. Boston, Cape Cod & New York Canal Company, now on file in the United States Supreme Court may be considered as having been filed subsequent to September 23, 1920, and in accordance with the rules of the United States Supreme Court.

WARNER, STACKPOLE & BRADLEE,

Proctors for Northern Coal Company.

CURRIER & YOUNG,

*Proctors for the Boston, Cape Cod &
New York Canal Co.*

BLODGETT, JONES, BURNHAM &

BINGHAM,

Proctors for White Oak Transportation Co.

Clerk's Certificate.

I, Arthur I. Charron, Clerk of the United States Circuit Court of Appeals for the First Circuit, certify that pages 669 to 673, hereto prefixed, contain and are a true copy of the Opinion of the Court on Motion to Amend Decree and the Order of Court thereon and Stipulation in the case in said court numbered and entitled: No. 1399, White Oak Transportation Company et al., Appellant, v. Boston, Cape Cod & New York Canal Company et al., Appellees.

In testimony whereof, I hereunto set my hand and affix the seal of said United States Circuit Court of Appeals for the First Circuit, at Boston, in said First Circuit, this thirtieth day of September, A. D. 1920.

[Seal of United States Circuit Court of Appeals, First Circuit.]

ARTHUR I. CHARRON,

Clerk.

[Endorsed:] File No. 27,824. Supreme Court U. S., October Term, 1920. Term No. 467. White Oak Transportation Co. et al., Appellants, v. Boston, Cape Cod & New York Canal Co. et al. Certified copy of opinion of Circuit Court of Appeals on motion to amend decree. Filed Oct. 2, 1920.

TABLE OF CONTENTS.

	Page
STATEMENT OF UNCONTROVERTED FACTS	1
STATEMENT OF THE CASE	7
ARGUMENT	12
I. The Circuit Court of Appeals rightly held that the Canal Company was at fault in allowing the Bay Port to enter the canal	12
II. The Circuit Court of Appeals erred in holding that the petitioner White Oak Transportation Company was at fault for allowing its vessel to enter the canal	24
III. The Circuit Court of Appeals erred in not holding that the negligence of the Canal Com- pany in inviting and allowing the Bay Port to attempt passage of its canal continued as a proximate cause of the loss of the Bay Port and her cargo	34
(a) The first stranding	35
(b) The second stranding	45
IV. The Circuit Court of Appeals erred in not holding that the acts of omission of the master of the Bay Port after his vessel came afloat were <i>in extremis</i> , and the petitioner White Oak Transportation Company is not liable therefor	60
V. The Circuit Court of Appeals erred in not holding that the respondent has not sustained the burden of proving that the strandings could not have been caused by the shoal spots	69

A. The first shoal	Page 70
B. The second shoal	74
VI. Even if the Circuit Court of Appeals were right in holding the petitioner White Oak Transportation Company as well as the re- spondent at fault, it erred in not dividing damages	82
CONCLUSION	88

TABLE OF CASES CITED.

	Page
The Alabama and The Gamecock, 92 U. S. 695	85
The Annie R. Lewis, 50 Fed. 556	14, 32
The Armonia, 81 Fed. 227	31
The Atlas, 93 U. S. 302	85
The Aurania and The Republic, 29 Fed. 98, bottom p. 116	41
The Baltimore, 8 Wall. 377	38
Barber v. Lockwood, 134 Fed. 985	14, 41
Belden v. Chase, 150 U. S. 674	85, 86
Boston, Cape Cod & New York Canal Co. v. Seaboard Trans. Co., 270 Fed. 525	13, 22, 37
Boston, Cape Cod & New York Canal Co. v. Staples Transp. Co., 246 Fed. 549	13, 43
Boston Woven Hose etc. Co. v. Kendall, 178 Mass. 232, 236, 237	58
Bramble v. Culmer, 78 Fed. 497	30
The British Isles, 264 Fed. 318	58
The Buckhurst, 6 P. D. 152	66
The Calvin P. Harris, 33 Fed. 295	14, 31
The Catherine, 17 How. 170	85
Cayzer v. Carron Co., 9 App. Cas. 873	84
The Cetus, 202 Fed. 189	66

	Page
The Chicago, 100 Fed. 999	66
The China, 7 Wall. 53	31
Clifford v. Atlantic Cotton Mills, 146 Mass. 47 and 48,	59
Daly v. Quinlan, 131 Fed. 394	14
The Dauntless, 121 Fed. 420	69
The Daylesford, 30 Fed. 633	87
The Ellis, 152 Fed. 891	69
The Eugene F. Moran, 212 U. S. 466	85
Garfield & Proctor Coal Co. v. Rockland-Rockport Lime Co., 184 Mass. 60	43
Gibbs et al. v. The Trustees of the Liverpool Docks, 3 H. & N. 164	23
Glynn v. Central R. R. Co. 175 Mass. 510, 511	58
Hartford & N.Y. Transp. Co. v. Hughes, 125 Fed. 981, 14, 32	14, 32
The John A. Berkman, 6 Fed. 535	14, 19
The John Fraser, 21 How. 184	85
The Lady Pike, 21 Wall. 1	38
Lie v. San Francisco & Portland S. S. Co., 243 U. S. 291	69
Look v. Portsmouth, K. & Y. St. Ry., 141 Fed. 182	33
The Manitoba, 122 U. S. 97	85
The Marcellus, Fed. Cas. 2347	30
The Maria Martin, 12 Wall. 31	85
The Max Morris, 137 U. S. 1	87
McKinley et al. v. Morrish et al., 21 How. 343	41
The Natchez, 78 Fed. 183	80
New Eng. Fuel & Transp. Co. v. City of Boston, 257 Fed. 778	58
Nickerson v. Tirrell, 127 Mass. 236	43
The North Star, 106 U. S. 17	85
The Oregon, 158 U. S. 186	30, 66
Otis v. I. M. Luddington's Sons, Inc., 229 Fed. 454	43
P. Dougherty Co. v. Bader Coal Co., 244 Fed. 267	33
The Pacific, 154 Fed. 943	66

	Page
Panama R. R. Co. v. Napier Shipping Co., 166 U. S.	
280	25
Parnaby v. Lancaster Canal Co., 11 Ad. & El. 223,	
243	13
The Pennsylvania, 19 Wall. 125, 9, 11, 44, 55, 69, 74, 75	
The Philadelphia, 199 Fed. 299	66
Phila. & R. Ry. Co. v. Walker, 139 Fed. 855	32
The Queen City, 189 Fed. 653	66
The Queen Elizabeth, 122 Fed. 406	66
The Ralph Creyke, 55 L. T. (N. S.) 155	37
Riddle v. Props. of Locks & Canals on the Merrimac	
River, 7 Mass. 169	13
Robinson v. Navigation Co., 73 Fed. 883	87
The Sam Sloan, 65 Fed. 125	80
The Sapphire, 11 Wall. 164	38, 85
Smith v. Burnett, 173 U. S. 430	14
The Thielbek, 241 Fed. 209, 216	69
Towboat No. 1, 74 Fed. 906	80
The Umbria, 166 U. S. 404	25
Union Ice Co. v. Crowell, 55 Fed. 87	14
The Union S. S. Co. v. N. Y. & Va. S. S. Co., 24	
How. 307	85
The Vera, The Melrose, 224 Fed. 998	58
The Victory, 63 Fed. 631; 68 Fed. 395; 168 U. S. 410,	87
The Washington and The Gregory, 9 Wall. 513	85
Union Stockyards Co. etc. v. Chicago etc. R. R. Co.,	
196 U. S. 217 at 228	59
Wilson v. Pilots' Ass'n, 55 Fed. 1000	31
The Yankee, 203 Fed. 73	41

OTHER AUTHORITIES CITED.

	Page
Abbott on Shipping, Part III, Chap. 1 §, 2 . . .	86
Benedict on Admiralty, § 471	86
Cleirac U. S. et Coutume de la mer, 55	86
Hopkins on Average, 189	86
Hughes on Admiralty, 192, 208, 276, 277 . . .	86, 87
Laws of Oleron, Article 14	84
Laws of Wisbuy, Article 27	84
Maclachlin on Merchant Shipping, 274	86
Ordonnance of Louis XIV, Title 7, Sections X and XI,	84
1 Pardessus Collection de Lois Maritime, 334 . . .	86
1 Peters Admiralty Decisions, App. XXIII . . .	86



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1921.

No. 116.

WHITE OAK TRANSPORTATION COMPANY,
PETITIONER,

v.

BOSTON, CAPE COD & NEW YORK CANAL
COMPANY, RESPONDENT.

No. 124.

NORTHERN COAL COMPANY, PETITIONER,

v.

BOSTON, CAPE COD & NEW YORK CANAL
COMPANY, RESPONDENT.

BRIEF FOR PETITIONER WHITE OAK TRANSPORTATION COMPANY.

STATEMENT OF UNCONTROVERTED FACTS.

The petitioner, White Oak Transportation Company, was the owner and operator of the steamer Bay Port, a steel collier of the ordinary whaleback type, of 1,399 tons gross, 1,075 tons net, 265 feet in length and 38 feet in width, of the value of about \$295,000. At the time of the accidents hereinafter set forth, the steamer had on board a cargo of 2,393 tons of coal, the property of the petitioner, Northern Coal Company, of the value of about \$12,500. The vessel had been first used on the Great Lakes, but for many years had been operated on the

Atlantic coast in the carriage of coal from Norfolk, Virginia, to New England ports.

The respondent is a Massachusetts corporation organized and existing under a special Act of the Massachusetts legislature (Acts of 1899, Chapter 488), which Act (§ 3) provides as follows:—

“Said corporation may locate, construct, maintain and operate a ship canal, beginning at some convenient point in Buzzards Bay and running through the towns of Bourne and Sandwich, or either of them, to some convenient point in Cape Cod or Barnstable Bay; may locate, construct and maintain all such wharves, docks, breakwaters and other structures and works as may be necessary for the convenient use of said canal, together with the highways and tunnels provided for by this act; and may maintain and operate steam and other vessels for transportation, and steam tugs, or may use any other means or methods for assisting vessels in their approach to and passage through and from the canal. *Said canal, when constructed, shall have a depth of not less than twenty-five feet at mean low water, and a width of not less than one hundred feet at the bottom, with suitable slopes and with a surface width of not less than two hundred feet.*” (Italics ours.)

The previous trips of this collier when loaded had been by the outside route around Cape Cod. On two occasions *when light* she had proceeded through the canal to the westward without any difficulty.

A short time before the strandings hereinafter set forth, a special duly authorized representative of the respondent called on the petitioner White Oak Transportation Company and requested it to send its whaleback colliers (one of which was the Bay Port) through the canal on their

trips to the eastward with coal. (Ints. 81 and 82, Rec. pp. 62-63, and answers thereto p. 72 ; Geer, Rec. p. 343, X-Q. 163-165 ; Morton, J., Opinion, Rec. p. 26.)

The petitioner White Oak Transportation Company, being told by the respondent's representative that the canal was completed and that it had 25 feet of water in the channel at all points at mean low water, gave instructions to its masters, including the master of the Bay Port, that they were at liberty to use the canal when bound to the eastward with cargoes, if they desired to do so. The master of the Bay Port had received from the respondent a pamphlet (Petitioner's Exhibit No. 11), which he had read throughout, in which it was stated that the depth of water in the channel of the canal was "at mean low water, 25 feet" (Morton, J., Opinion, Rec. p. 21 ; Circuit Court of Appeals Opinion, Rec. p. 548), and acting upon such information he determined to accede to the request of the respondent and allow his vessel to pass through the canal to the eastward with a cargo of coal on this occasion.

Accordingly on the morning of December 13, 1916, when proceeding from Newport News, Virginia, to Weymouth, Massachusetts, the steamer Bay Port arrived at the western or Buzzards Bay entrance of the Cape Cod Canal, anchored off Wings Neck and signaled for a tug and pilot and for permission to pass through the canal. Word was telephoned from the Wings Neck office of the respondent company to its superintendent at Buzzards Bay, and on his orders the tug Dalzelline with Captain Rochester, a canal pilot, on board, was sent to take the Bay Port through the canal. After some delay, due to the passage of another vessel to the westward through the canal, signal was set under the orders of the superintendent to allow the Bay Port to proceed. The canal superintendent knew the vessel, her type and draft, at the time he gave these orders. Previously he, believ-

ing it inadvisable to allow this type of vessel to enter the canal, had made complaint to the executive officers of the Canal Company, but his objection had been overruled, and as a result he gave the permit on this occasion for the passage through of the steamer Bay Port. The tug took a hawser from the bow of the Bay Port, the pilot boarded her and gave orders to the tug and the Bay Port to start their engines; and the Bay Port, in charge of the pilot, entered upon her voyage through the canal. She drew 17 feet 8 inches forward and 18 feet 2 inches aft.

The Bay Port was handled strictly in accordance with the orders of the pilot, and no contention has been made by the respondent in the pleadings, testimony or arguments that she was handled improperly; in fact it is affirmatively pleaded by the respondent that on the occasion of each stranding all proper steps were taken in her navigation.

At about 2.15 P. M., when the steamer in tow as aforesaid had covered without any difficulty about half the voyage through the canal, she took a slight sheer to port followed by a sharp sheer to starboard, and struck the southerly bank of the canal, knocking a hole in her bottom and filling her cargo hold with water. The T. A. Scott Company, Inc., a competent wrecking company, was engaged at once, and its superintendent, Captain Joseph Lewis, arrived that evening and took charge of the operation of relieving the vessel from her stranded position. A conference was held that same evening between Captain Joseph Lewis, Captain W. H. Hammett, master of the Bay Port, and Captain William T. Lewis, the canal pilot and representative, and it was deemed advisable by all to get the vessel off and take her through the canal to the Sandwich end as quickly as possible. Captain Geer, the superintendent of the respondent, was of the same opinion and appointed Captain William Lewis to see that this was

done,—presumably under authority reserved by the respondent in its regulations to superintend the salvaging of vessels in its canal (Petitioner's Exhibit 11, p. 13, § 12; Circuit Court of Appeals Opinion, Rec. p. 549).

The next morning at about 10.15 A. M. while preliminary steps were being taken looking to the floating of the steamer, and a wrecking lighter which had been brought from Boston was commencing to jettison the cargo, the steamer *unexpectedly* slid off into the deep water of the canal and started to drift to the eastward with the three to three and a half knot current, being by reason of her wet cargo and water in her hold, down by the head and having a slight list to port. Captain Joseph Lewis, the wrecking superintendent, who was on the lighter, called out to Captain William Lewis, the canal pilot, who was on board the steamer, that she was off and it was "up to him". Captain William Lewis, the canal pilot, replied "all right", took the wheel, ordered the captain of the steamer to put his engines ahead, and took general charge of the navigation of the steamer.

At the time in question there were three tugs in the vicinity; one after the Bay Port came afloat was engaged in caring for the wrecking lighter and at no time was available as an aid to the steamer; another was unable to get a line to the Bay Port before the second stranding, and in fact in the excitement struck the bank of the canal and broke her propeller. The third, however, got a line to the bow of the steamer, and the Bay Port in tow of this tug and under her own steam and with Captain William Lewis, the canal pilot, in charge continued on her voyage. Captain William Lewis was not only a canal pilot, but in the absence of Superintendent Geer he, on this occasion, acted as the agent of the Canal Company in getting the Bay Port out of the canal (Geer, Rec. p. 338, Q. 90-91).

After the steamer had proceeded about a mile she again lost her equilibrium, and after taking a slight sheer to starboard sheered heavily to port and struck the northern bank of the canal, sustaining damage which caused her shortly thereafter to sink and become, with her cargo, a total loss.

At this time there existed in the channel of the canal two shoal places *over which there were only from 18 to 19 feet of water at mean low water*, and it was on the first occasion three of her lengths and on the second occasion six of her lengths respectively that the Bay Port traversed from the shoal to the point where she struck the bank. On the first occasion the tidal current was against the steamer and on the second occasion with her. *The existence of these shoal places was unknown to the petitioners and to the pilots and towboat men in the canal, but they admittedly existed with the full knowledge of the respondent, which had misrepresented the situation in its advertisement that there were twenty-five feet of water in the canal at mean low water.* Further, these two shoals were the only shoal places existing in the canal from the western entrance to the point where the steamer foundered.

In addition to these shoal places, the respondent had left on the north bank of the canal, at a place where in the construction of the canal a dam had been built, a projection in the canal forming a knuckle. This knuckle was about opposite where the steamer struck the southern bank, and its effect was to deflect the current toward the southerly bank of the canal (Morton, J., Opinion, Rec. p. 22).

Further, the bottom of the canal in that location, which is composed of boulders and sand, had been left in a jagged condition, causing swirls, cross-currents and eddies.

STATEMENT OF THE CASE.

The Boston, Cape Cod & New York Canal Company filed a libel against The T. A. Scott Company, Inc., seeking to recover damages for negligent salvage operations in allowing the said steamer to come afloat and finally sink and block the canal for commercial use. At the same time the Boston, Cape Cod & New York Canal Company filed a libel against the White Oak Transportation Company, seeking to recover for the same damages, alleging that the White Oak Transportation Company had allowed said steamer improperly to enter said canal when she was difficult to steer and control, and in not removing her from her sunken position.

The White Oak Transportation Company filed its libel against the Canal Company, seeking to recover damages for loss of its steamer, and alleging, among other things, the negligent condition, operation and management of its canal in connection with both strandings, and the cargo-owner, Northern Coal Company, by intervening petition, intervened in said action to recover for the loss of its cargo. In this latter case the respondent, under Admiralty Rule 59 (present Rule 56), petitioned in The T. A. Scott Company, Inc., as a party respondent. All three cases were tried together by agreement of counsel, although not formally consolidated for trial by order of the court.

The District Court found in favor of the respondents in all three cases. It held that the first stranding was "due either to pure accident or to faulty navigation by the pilot" in the handling of the Bay Port between the time she began to sheer after passing the first shoal spot and the time she struck the bank. This latter finding was made without any basis in the testimony and without any

foundation in the pleadings; *in fact contrary to the affirmative pleading of the respondent that the vessel was handled properly.* The District Court exonerated the Canal Company from fault, holding that the first shoal was not the proximate cause of the stranding.

With reference to the second stranding the District Court found no fault on the part of any of the three parties, considering the accident as inevitable.

The libellants in all three cases and the intervening petitioner duly took appeals which were heard and argued before the Circuit Court of Appeals for the First Circuit.

The Circuit Court of Appeals in considering the first stranding acquiesced in the belief of the Honorable Judge of the District Court that the shoal was not the proximate cause, but found both the owner of the steamer and the Canal Company at fault for allowing this vessel to enter the canal; *instead, however, of applying the well established admiralty rule of half damages, the Circuit Court of Appeals applied the common law rule, and neither the petitioner White Oak Transportation Company, nor the respondent nor even the petitioner Northern Coal Company, owner of the cargo, was allowed to recover.*

Upon entry of the decree, the petitioner Northern Coal Company filed a motion to amend the decree on the ground that, being an innocent party, it was entitled to recover from the Canal Company for its damages received in the first stranding. This motion was denied (Judge Anderson dissenting).

In determining the cause of the second stranding, the Circuit Court of Appeals held that, although the respondent was at fault in allowing the Bay Port to enter the canal, it did not assent to her navigation of the canal "in the condition in which she was when she slid off the bank"; that the second shoal was not the proximate cause of the second stranding, and that the petitioner White Oak

Transportation Company was at fault because the master of the Bay Port did not, after his vessel came afloat, take over the navigation of his vessel from the canal pilot and attempt to hold her by tugs in the canal or tie her up to dolphins until she could be pumped out and her cargo trimmed. The contention of the petitioner White Oak Transportation Company that these were, if anything, acts of omission *in extremis*, apparently was not considered by the Circuit Court of Appeals. It absolved the wrecker, The T. A. Scott Company, Inc., which had full charge of the Bay Port when she floated, from all blame, confirming the opinion of the District Court.

The District Court, not having found the respondent at fault in inviting and permitting the steamer to attempt the passage of the canal, did not need to consider whether this act continued as a contributing cause of the second stranding. This, however, became a pertinent issue before the Circuit Court of Appeals. Judge Johnson in the first opinion to which there was no dissent held that there was no causal connection; Judge Anderson, however, dissenting in the supplemental opinion, held that the original negligence of the Canal Company continued as an efficient and proximate cause of the second stranding.

The petitioner White Oak Transportation Company has contended in both courts that inasmuch as the respondent was under a statutory duty to maintain 25 feet of water at mean low water in the canal under its Act of Incorporation, and inasmuch as it admittedly did not do so, but allowed shoals to make up to 18 and 19 feet, mean low water, and the disaster on each occasion occurred shortly after passing these shoal spots with no preponderating intervening cause, then under

The Pennsylvania, 19 Wall. 125,

the burden is upon the respondent to show not only that

the shoals did not cause, but that they *could not* have caused the strandings. This rule of law, which was established by this Court, has been completely ignored by both the lower courts.

The owner of the steamer and the owner of her cargo duly filed petitions for writ of certiorari, which were allowed, and the cases are in review before this Court.

QUESTIONS AT ISSUE.

The facts of the case give rise to the following questions :

1. Whether the Circuit Court of Appeals rightly held the Canal Company at fault in allowing the Bay Port to enter the canal.
2. Whether the Circuit Court of Appeals erred in holding that the petitioner White Oak Transportation Company was at fault for allowing its vessel to enter the canal.
3. Whether the negligence of the Canal Company, in inviting and allowing the steamer to attempt the passage of the canal, was a contributing cause of each stranding and the loss of the Bay Port and her cargo.
4. Whether the *in extremis* rule absolves the petitioner White Oak Transportation Company from fault for the second stranding.
5. Whether under *The Pennsylvania* case the respondent has sustained the duty to show that the violation of the statutory provision to maintain 25 feet of water at mean low water could not have contributed to each stranding.
6. Whether the Circuit Court of Appeals erred in not dividing damages upon finding that both the Canal Company and the petitioner White Oak Transportation Company were at fault.

ARGUMENT.

I. THE CIRCUIT COURT OF APPEALS RIGHTLY HELD THAT THE CANAL COMPANY WAS AT FAULT IN ALLOWING THE BAY PORT TO ENTER THE CANAL.

The Circuit Court of Appeals, in finding that the Canal Company was negligent, stated as follows : —

“ While we think the Bay Port was negligent in attempting to use the canal in her deeply laden condition, we think the Canal Company was equally at fault in allowing her to use it, and that neither should recover for any damage which may have been suffered by reason of her attempt to go through in the condition in which she was when she entered it.”

(Circuit Court of Appeals Opinion, Rec. p. 552) ;

and also :

“ While we think the Bay Port was negligent in attempting to go through the canal, yet we also think the Canal Company was equally negligent in allowing her to enter it and that the hazard of her attempted passage was assumed by the Canal Company with full knowledge of the risk.”

(Circuit Court of Appeals Opinion, Rec. p. 551) ;

and Anderson, J., in the supplementary opinion states :

“ This court has already found the Canal Company negligent in inviting the Bay Port into its canal, because of the probability that what did happen would happen, to wit, that the vessel would run aground.”

(Anderson, J., Opinion, Rec. p. 573.)

The duty of the Canal Company toward the Bay Port is

expressed by the Honorable Judge of the District Court as follows : —

“ The Canal Company does not guarantee the safety of vessels using the canal ; its obligations are not to misrepresent what it offers, and to use reasonable care for the safety of vessels which accept its offer and avail themselves of the canal.”

(Morton, J., Opinion, Rec. p. 20.)

The Circuit Court of Appeals accepts this statement as a basis for its own findings (Circuit Court of Appeals Opinion, Rec. p. 551), and it is in accord with previous expressions of the courts upon this point. As stated by Dodge, J., in

Boston, Cape Cod & New York Canal Co. v. Staples Trans. Co., 246 Fed. 549,

where the tug Watuppa grounded upon a shoal in the Cape Cod Canal :

“ While not an insurer against all damage by defects or obstructions in its canal, if the canal company knew or ought to have known that such an obstruction existed therein, it is undoubtedly liable for injuries caused by its presence to vessels using the canal, as these (vessels) were, by its invitation and without warning of the danger to be apprehended from said obstruction, unless contributing fault on their part is shown.”

This Watuppa case and also the recent decision in

Boston, Cape Cod & New York Canal Company v. Seaboard Transportation Company, 270 Fed. 525,

adopt the principles set forth in

Riddle v. Prop. of Locks & Canals on the Merrimac River, 7 Mass. 167,

which latter case is in accord with the English case of

Parnaby v. Lancaster Canal Co., 11 Ad. & El. 243.

This principle applied to canals rests on the well settled rule, which has been applied to private docks and approaches thereto.

Smith v. Burnett, 173 U. S. 430.

Union Ice Co. v. Crowell, 55 Fed. 87.

The John A. Berkman, 6 Fed. 535.

The Calvin P. Harris, 33 Fed. 295.

The Annie R. Lewis, 50 Fed. 556.

Barber v. Lockwood, 134 Fed. 985.

Hartford & N. Y. Trans Co. v. Hughes, 125 Fed. 981.

Daly v. Quinlan, 131 Fed. 394.

The evidence in the present case fully substantiates this finding by the Circuit Court of Appeals of negligence on the part of the Canal Company.

In an attempt to provide business for the canal, the Canal Company had sent a special agent to the office of the operators of the steamer Bay Port and attempted to persuade them to allow their vessels of the whaleback type, including the steamer Bay Port, to use the canal while loaded (Ints. 81 and 82, Rec. pp. 62-63, and answers thereto, Rec. p. 72; Morton, J., Opinion, Rec. p. 26; Geer, Rec. p. 343, X-Q. 162, 165). As a result of this solicitation the master of the Bay Port was instructed by the owner of the vessel to use his own judgment on the particular occasion as to whether to take his vessel through the canal. In so far as the owner and master of the Bay Port knew, the canal had 25 feet of water at mean low water through its entire length. The required statutory depth was 25 feet at mean low water (Massachusetts Acts of 1899, Chap. 448, § 3) and the circular of "General Information and Regulations" issued by the Canal Company, after having been passed upon by the board of directors of the Canal Company (Belmont, Rec. pp. 539, 540, X-Q. 15-26), stated that there were 25 feet of water in the chan-

nel of the canal (Petitioner's Exhibit No. 11; Hammett, Rec. pp. 424-425, Q. 18-24; Morton, J., Opinion, Rec. p. 21 bottom; Circuit Court of Appeals Opinion, Rec. pp. 548-549); and this information had been read by Captain Hammett of the Bay Port prior to the entrance of his vessel into the canal on this occasion (Hammett, Rec. pp. 424-425, Q. 18-24; Morton, J., Opinion, Rec. p. 21; Circuit Court of Appeals Opinion, Rec. pp. 548-549).

This information was in fact untrue, to the knowledge of the respondent at the time of the strandings; for there were in the canal between the Buzzards Bay entrance and the point where the Bay Port foundered two pronounced shoals, of both of which the respondent had complete information from its engineering department.

The first shoal was what was known to the Canal Company as the "graveyard" of the canal (Geer, Rec. p. 337, Q. 82. See Murphy, Rec. p. 516, Q. 12). Its character and condition were known to the Canal Company, the latter having, 23 days prior to the date of the stranding, sounded that portion of the canal, and the report of the survey (Bay Port Exhibit 1, Rec. p. 244) was, prior to the strandings, in its administrative office. This blueprint shows a depth between stations 243 and 242 of 19.5 feet and 20 feet mean low water, and in the centre line of the canal between stations 242 and 241 a depth of 19.3 feet. The District Court found that there were 19½ feet of water over this shoal at mean low water (Morton, J., Opinion, Rec. p. 22), and this finding was concurred in by the Circuit Court of Appeals (Opinion, Rec. p. 551). The size of the shoal is indicated from the report of the digger, which excavated there after the grounding. The dredge Kennebec took out from Station 242, 1350 yards of earth (Rec. p. 455). The Bay Port struck the bank of the canal about 1,000 feet from where this shoal termin-

ated (Morton, J., Opinion, Rec. p. 22; Circuit Court of Appeals Opinion, Rec. p. 551).

A short distance to the eastward of this shoal and on the north bank about opposite where the Bay Port struck was a knuckle or projection of the bank into the canal proper (Canal Company Exhibit 3), being the end of a dam which the Canal Company had used in the excavation work and had not completely removed. This projection had a tendency to deflect the current toward the southerly bank of the canal (Morton, J., Opinion, Rec. p. 22; Robbins, Rec. p. 386, X-Q. 24-25; B. Kemp, Rec. p. 389, X-Q. 26-27; Brennan, Rec. p. 397, X-Q. 64-66). The effect of this knuckle upon the Bay Port is stated by the Honorable Judge of the District Court as follows: —

“It seems probable that, after the Bay Port had begun to turn away from the north bank, she was caught by this current (from the knuckle) as well as by the general current in the canal, and that the cross-current was one of the forces which prevented her from being controlled in time to avoid stranding.”

(Morton, J., Opinion, Rec. p. 22.)

The second shoal was likewise known to the Canal Company; soundings made June 13, 1916 (Petitioner's Exhibit 3, Rec. p. 247), gave a 20-foot mean low water depth, and between Stations 194 and 193, 18.2 feet. Further soundings taken August 17, 1916 (Petitioner's Exhibit 3, Rec. p. 247), indicate that the shoal was enlarging (Crocker, Rec. pp. 246-247, X-Q. 165-169), and soundings taken on November 18, 1916 (Petitioner's Exhibit 4, Rec. p. 249), shows a further lengthening of the shoal, and between Stations 193 and 192, 18.2 feet mean low water in depth for at least half of the 100-foot centre line, and the presumption is that this shoal had grown further in the period between November 18 and the date of the strand-

ing, December 13, 1916.. The District Court found that there were 20 feet of water over this shoal at mean low water and the Circuit Court of Appeals concurred in this finding, apparently overlooking the Canal Company report as shown on Petitioner's Exhibit 4.

The Bay Port struck the bank of the canal about 2,000 feet west of this second shoal (Morton, J., Opinion, Rec. p. 25; Circuit Court of Appeals Opinion, Rec. p. 551).

Not only were there these two well defined shoals in the canal but the canal prism had been left in a condition of pronounced irregularity. The canal was dug through a soil of sand and large boulders (Petitioner's Int. 80a and Ans., Rec. pp. 62, 72). These boulders had been left uncovered, and the bottom and sides of the canal were strewn with these huge, irregular-shaped blocks of stone (Brunn, Rec. p. 367, Q. 36-40). Around these boulders sand had collected, which had been washed from underneath the rip-rap on the banks of the canal by reason of the passage of the Metropolitan passenger liners and other fast boats (Fanning, Rec. p. 129, Q. 67; Crocker, Rec. p. 254, X-Q. 224-227). The erosion of this sand had been so great that the rip-rap, built on a two-in-one angle, had dropped in many places to a horizontal (Crocker, Rec. p. 254, X-Q. 224-230; Fanning, Rec. p. 129, Q. 67-75; p. 130, X-Q. 79-82).

These boulders, with their accumulations of sand, had left the bottom of the canal exceedingly irregular in depth (Crocker, Rec. p. 254, X-Q. 231-232) (Morton, J., Opinion, Rec. p. 21).

An examination of the elevation map by soundings of June 1, 1916 (Respondent's Exhibit 2, Rec. p. 244), with its series of peaks indicate clearly the abrupt changes of depth in the canal. The plan of the shoal at Station 241 (Petitioner's Exhibit 1, Rec. p. 244) shows depths varying 12 feet in a distance on the bottom of 25 feet. The plan

at Station 247 (Petitioner's Exhibit 6, Rec. p. 251) indicates the same condition, and all the plans show extreme irregularity of the bottom.

Mr. Brunn, the diver, a former employee of the Canal Company, who testified for the respondent The T. A. Scott Company, Inc., and who made the examinations supplying the information incorporated in the Canal Company plans, testified in court that he had walked pretty nearly the whole length of the canal under water, and he "don't believe there is 100 feet in the south side of the canal but what there is a boulder projecting up between Sandwich bridge and Wing's Neck" (Brunn, Rec. p. 367, Q. 36). This pronounced irregularity in the slopes and bottom of the canal naturally causes eddies and swirls in the strong current, interfering with the proper navigation of a deep-laden vessel passing through this waterway.

The presence of the two large shoals in the canal was denied by the Canal Company under oath in answer to interrogatories (Ans. to Petitioner's Ints. 58 and 66, Rec. pp. 61 and 71) until the court ordered the canal company to produce its blueprints (Interlocutory Opinion, Rec. pp. 76-77). Knowledge of their presence prior to the strandings was finally admitted by the superintendent of the canal (Geer, Rec. p. 525, X-Q. 342); by its engineer (Crocker, Rec. p. 242, X-Q. 108-109; p. 243, X-Q. 130-134; p. 254, X-Q. 228), and in open court by proctor for the Canal Company (Rec. pp. 277, 340); yet they did not notify the pilots or the canal towboat masters of the existence of these shoals (Petitioner's Int. 68 and Ans. pp. 61 and 71; Crocker, Rec. p. 243, X-Q. 134-136; Wagner, Rec. p. 231, X-Q. 82-87; Smith, Rec. pp. 234-235, X-Q. 44-48; McGilvray, Rec. p. 225, X-Q. 28-31), and superintendent Geer, having this knowledge of those shoals, knuckle, the abrupt irregularity of the sides and bottom of the canal and the currents, swirls and eddies, and knowing the type and draft of the

Bay Port (Circuit Court of Appeals Opinion, Rec. p. 552) gave permission for the Bay Port to enter the canal, and chose a time for her passage so as not to interfere with the profitable business of the Boston-New York passenger boats (Geer, Rec. p. 343, X-Q. 155-162 ; p. 526 X-Q. 355).

The entrance under Captain Geer's direction was at half tide (Morton, J., Opinion, Rec. p. 22; Circuit Court of Appeals Opinion, Rec. p. 549), *whereas had he waited until full tide not only would there have been 2½ feet more of water under her* (Morton, J., Opinion, Rec. p. 22; Crocker, Rec. p. 253, X-Q. 210-211; Dunbar, Rec. p. 276, Q. 82; Circuit Court of Appeals Opinion, Rec. p. 551), *but there would have been slack water, which would have made it much safer for the passage of the vessel* (Circuit Court of Appeals Opinion, Rec. p. 556; Geer, Rec. p. 526, X-Q. 352).

See *The John A. Berkman*, 6 Fed. 535.

It cannot be argued that Superintendent Geer acted without appreciation of the character of the Bay Port. The Honorable Judge of the District Court found:

"It was a fairly common type, the characteristics of which were known to the Canal Company."

(Morton, J., Opinion, Rec. p. 26.)

The Circuit Court of Appeals on this point states:

"Her peculiar structure and draft must have been as well known to the superintendent of the canal as to the captain of the vessel, for he testified that he saw her as she entered the canal, and the pilot who went out to her asked her captain her draft and was informed what she drew both forward and aft and must have reported to the superintendent what he was told, as the superintendent was to pass upon her admission to the canal and she could not enter the canal without his permission."

(Circuit Court of Appeals Opinion, Rec. p. 552.)

With this knowledge of the shoal spots and their effect upon the deep laden whaleback colliers, Captain Geer, the canal superintendent, complained, prior to the entrance of the Bay Port, to the executive officers of the Canal Company in New York against the passage of these vessels through the canal (Circuit Court of Appeals Opinion, Rec. pp. 551-552). Captain Geer's testimony upon this point is as follows : —

"X-Q. 342 (by Mr. BLODGETT). Captain, you were asked in reference to the letter of March 11th, which has been offered referring to the Lansing going through. Do you remember that in May or June after that you received information through Mr. Crocker that he had found two shoals of about 18 to 20 feet of water in depth? A. I know I did after that, yes, sir — I don't know how long after.

"X-Q. 343. And after that did you have any conversation with Commodore Miller, Vice President of the Canal Company, about taking these vessels through? A. Yes, sir; I even went as far as to send one of the Boston ships around the Cape when I didn't think there was water enough in the canal. She came to the canal, and I forbade her going through, and she went around the Cape.

"X-Q. 344. And you said in answer to a question of Mr. Pillsbury's that you later changed your mind about it? A. After I had been at the canal a short time I changed my mind about the size of the vessels, and I took it up with Commodore Miller several times and I guess the New York office has got letters and records showing I did take it up.

"X-Q. 345. Did the information you received from Mr. Crocker as to this 18 or 19-foot shoal have any

effect on you in changing your mind? A. Yes, sir; after he told me that, it changed my mind."

(Geer, Rec. p. 525.)

"X-Q. 352. 'At almost any kind of a tide'? A. They ordered me to take these ships, to have them go through; I was ordered to have those ships through; and if they were delayed, then I got a letter from the New York office about it; and if I waited for slack water to take them through, I couldn't begin to do the business that they wanted me to."

(Geer, Rec. p. 526.)

"X-Q. 119 (by Mr. BLODGETT). Captain, had you had any talk, prior to this accident, with Commodore Miller in reference to the condition of the bottom of the canal? A. Yes, sir; a great many times.

"Mr. PILLSBURY. I have already stated that we do not contend that the company did not know of the condition, so I do not think you need to go into this. I admitted it in connection with the other witness, Dunbar.

"Mr. BLODGETT. If my brother admits that it was unsafe to take this boat through, I am perfectly willing to take that admission and not ask the question.

"Mr. PILLSBURY. Of course I do not admit anything of the sort. I admit that whatever the conditions were that existed, that fact or those facts were known to the Canal Company and to the officers of the company. I do not suppose the conversation that they had would prove whether it was dangerous to take a boat through or not.

"X-Q. 120. Captain, after July 1st of that year, and before the accident, did you have any talks with Commodore Miller in reference to the advisability,

with the canal in the condition it was, of taking through these lake-built pig barges or steamers loaded? A. Yes, sir; I told him it was not safe to take them through.

"X-Q. 121. And what did he say to you? A. He says: 'You have got to take them through, because Mr. Belmont says that we have got to get the money to pay the interest on the bonds.'

"X-Q. 122. And when this Bay Port came up you gave instructions to allow her to go through? A. Yes, sir.

"X-Q. 123. In accordance with your conversation with Commodore Miller? A. Yes, sir."

(Geer, Rec. pp. 340-341.)

"X-Q. 318. What was the specific reason of your resigning from the Cape Cod Canal Company at that time? A. Well, I was hired to have full charge of that canal in taking vessels through, and my judgment was to be supreme. Well, after I had been there a few months, it was all right. Then they commenced to put on these pig ships on to me. I kept telling them they would get into trouble if they sent those ships through. Well, they says: 'We have got to do it, we have got to have the money'."

(Geer, Rec. p. 354.)

Superintendent Geer of the Canal Company testified in a previous case before the District Court, and Judge Morton said of him: "He impressed me as being a truthful witness." (*Boston, Cape Cod & New York Canal Co. v. Seaboard Transp. Co.*, 270 Fed. 525.)

The Canal Company officials therefore specially solicited this vessel to use the canal, having knowledge of the shoals and knuckle and currents and their effect upon a deep-

laden vessel of the type of the Bay Port ; which knowledge it not only concealed from the petitioner and the master of the Bay Port, but also concealed from all the pilots and towboat captains operating in the canal ; and its superintendent, acting against his own judgment, but under orders of the officials of the respondent company, not only admitted the Bay Port but took a chance and admitted her at half tide instead of waiting for slack high water.

As is stated by Coleridge, J., in

Gibbs et al. v. The Trustees of the Liverpool Docks,
3 H. & N. 164,

which was a suit based upon damage to a vessel and cargo due to striking a bed of mud at the entrance to a dock :

“ We think that if they had discretion under the circumstances to let the danger continue, they ought as soon as they knew of it to have closed the dock to the public ; and that they had no right, with the knowledge of its dangerous condition, to keep it open and to invite the vessel in question into the peril which they knew it must encounter, by continuing to hold out to the public that any ship, by payment of the tolls to them, might enter and navigate the dock.”

So in the present case, either the Canal Company should have closed the canal or it should have limited its use to craft of small size, shallow draft and easy navigation, until it was made safe as was contemplated in its Act of Incorporation.

The petitioner respectfully submits that the Circuit Court of Appeals rightly held that the Canal Company should be held at fault for allowing the Bay Port to enter the canal under the circumstances of this case ; — as Judge Anderson states “ because of the probability that what did happen would happen, to wit, that the vessel would run aground ”.

**II. THE CIRCUIT COURT OF APPEALS ERRED IN
HOLDING THAT THE PETITIONER WHITE
OAK TRANSPORTATION COMPANY WAS AT
FAULT FOR ALLOWING ITS VESSEL TO ENTER
THE CANAL.**

This question is open for the consideration of this Court.
The District Court found:

"On the evidence now before the court she appears to have been a staunch vessel properly manned, supplied and equipped. No failure of her mechanism entered into either accident. She steered as well as the ordinary whale-back steamer; but vessels of that type do not handle as sharply, nor as well, as those of the usual deep-sea model. She was deeply laden; but not so as to interfere with her ability to manoeuvre."

(Morton, J., Opinion, Rec. p. 20.)

And again:

"It does not appear that the ability of the Bay Port to manoeuvre was inferior to that of the ordinary steamer of her size and type. It was a fairly common type, the characteristics of which were known to the Canal Company. The Transportation Company had been solicited by the Canal Company to send its steamers, including the Bay Port, through the canal. It can hardly be held negligent for accepting the invitation of the libellant."

(Morton, J., Opinion, Rec. p. 26.)

And the court declared not sustained the charge that the White Oak Transportation Company was negligent "in taking her into the canal at all".

The Circuit Court of Appeals, referring to the above statement of the District Court, found as follows:—

“We think this finding in regard to her steering qualities, qualified as it was ‘she steered as well as the ordinary whaleback steamer’ is in accord with the evidence, but this convinces us that any steamer of this type when deeply laden is very difficult to handle, much more so than those of the usual deep sea model. . . . While we think the Bay Port was negligent in attempting to go through the canal, yet we also think the Canal Company was equally negligent in allowing her to enter it.”

(Circuit Court of Appeals Opinion, Rec. p. 551.)

And again:

“While we think the Bay Port was negligent in attempting to use the canal in her deeply laden condition, we think the Canal Company was equally at fault in allowing her to use it.”

(Circuit Court of Appeals Opinion, Rec. p. 552.)

The views of the two lower courts on this point are diametrically opposed, and the matter is therefore a proper subject of review by this Court.

Panama R. R. Co. v. Napier Shipping Co., 166 U. S. 280.

The Umbria, 166 U. S. 404.

The petitioner White Oak Transportation Company contends that this finding by the Circuit Court of Appeals, that the said petitioner was at fault for allowing its vessel to enter the canal, was wholly unwarranted,—having no basis upon the evidence. This type of vessel, the whaleback merchantman, had been in use as a cargo carrier for a long period, formerly on the Great Lakes, and of late

years on the Atlantic Coast (Wilson, Rec. p. 152, X-Q. 112-113; Morton, J., Opinion, Rec. p. 26), and had been found in all respects seaworthy and manageable. The Bay Port was of the same design on the bottom as any other coast steamer. Her spoon bow and stern made her no more likely to sheer than a straight stem boat (Hammett, Rec. p. 436, Q. 249; Reeve, Rec. p. 501, Q. 50 and 51; J. I. Kemp, Rec. p. 332, X-Q. 152-154). She had, only a month previous to the disaster, come off the marine railway after extensive repairs and overhauling including the installation of a new bottom costing about \$100,000; she had steam steering gear (Lewis, Rec. p. 182, X-Q. 316) giving quick operation of her rudder; she was equipped with an approved type of balanced rudder (Shelton, Rec. p. 460, Q. 32-34), rendering easier response in her steering, and had received proper United States hull and boiler inspection certificates (Drake, Rec. pp. 407-408, Q. 6-21; Petitioner's Exhibit 13). She had on board a medium-sized cargo (Shelton, Rec. pp. 480-481, X-Q. 376-377, 379-380; J. W. Maker, Rec. p. 356, Q. 32-33; Dunton, Rec. p. 420, Q. 12-13), which gave her at the canal entrance a draft of 18 feet 2 inches aft and 17 feet 8 inches forward (Morton, J., Opinion, Rec. p. 22; Circuit Court of Appeals Opinion, Rec. p. 548); Hammett, Rec. p. 427, Q. 71; Hart, Rec. p. 411, Q. 23-26; Shelton, Rec. pp. 459-460, Q. 29-30; p. 479, X-Q. 352-355), which was regarded by all the witnesses on both sides as a proper trim for Atlantic Coast service (Morton, J., Opinion, Rec. p. 28; Hammett, Rec. p. 427, Q. 72; p. 436, Q. 245-249; Hart, Rec. p. 410, Q. 13-20; pp. 418-419, X-Q. 135-150; J. W. Maker, Rec. p. 355, Q. 16-19; p. 356, Q. 34-37; pp. 357-358, X-Q. 56-60; Dunton, Rec. pp. 420-421, Q. 14-24; p. 422, X-Q. 53; p. 423, X-Q. 57-63; Rochester, Rec. p. 262, X-Q. 83-90; Wilson, Rec. p. 158, X-Q. 178-182).

The only witness in the case who testified that the Bay

Port would be likely to sheer in the canal was the Canal Company's expert, Captain Wilson, and he based his opinion on what was not a fact, that she was down by the bow (Wilson, Rec. pp. 148-149, Q. 50-57; p. 150, Q. 65-66; pp. 152-153, X-Q. 114-116), and he admitted that, with the tug ahead and not down by the bow, she would be safe to navigate there (Wilson, Rec. p. 150, Q. 64; p. 153, X-Q. 123-128; p. 156, Q. 160); and he was assuming she had no balanced rudder (Wilson, Rec. p. 152, X-Q. 107-111), which was not a fact (Shelton, Rec. p. 460, Q. 32-34).

The Honorable Judge of the District Court found that "the ability of the Bay Port to manoeuvre was not inferior to that of the ordinary steamer of her size and type" (Morton, J., Opinion, Rec. p. 26). She had been navigated loaded in narrow channels like the Penobscot River to and from Bangor, Maine, the channel at Providence, R. I., and Hell Gate, New York, and no difficulty had been experienced with her steering abilities (J. W. Maker, Rec. pp. 356-357, Q. 38-42; Dunton, Rec. p. 421, Q. 32-36; Shelton, Rec. p. 465, Q. 130-132; p. 472, X-Q. 253-254). She had on two previous occasions passed through this canal bound to the westward light, without difficulty (Circuit Court of Appeals Opinion, Rec. p. 548); steered well coming up the coast on this trip (Shelton, Rec. p. 460, Q. 31-36) and gave no difficulty in the canal on this occasion until after she had just passed over the first shoal (Hammett, Rec. p. 427, Q. 75; p. 428, Q. 85; p. 436, Q. 250-252; Shelton, Rec. p. 461, Q. 53; Hart, Rec. p. 411, Q. 30-40; p. 412, Q. 42-46, 50-51; p. 415, Q. 104; L. Maker, Rec. p. 484, Q. 19-23; Rochester, Rec. p. 263, X-Q. 110; Lecompte, Rec. p. 188, Q. 8; p. 199, X-Q. 142-145; p. 200, X-Q. 167; Brennan, Rec. p. 377, X-Q. 63; Geer, Rec. p. 341, X-Q. 131-133; p. 342, X-Q. 141-145; Canal Company Exhibit 24 (report of Pilot Lewis); Morton, J., Opinion, Rec. pp. 20, 21).

The respondent as hereinbefore set forth had sent a special agent to the office of the operators of the steamer Bay Port to persuade them to allow their vessels of the whaleback type, including the steamer Bay Port, to use the canal upon their trips east loaded (Ints. 81 and 82, Rec. pp. 62-63, and Answers thereto, p. 72; Morton, J., Opinion, Rec. 26; Geer, Rec. pp. 343-344, X-Q. 163-165). As a result of this solicitation the master of the Bay Port was permitted to make use of the canal, using his own judgment as the occasion arose.

Captain Hammett of the Bay Port had, on one of the previous occasions when his vessel had passed through the canal bound to the westward, been presented with a printed pamphlet containing the rules and regulations of the respondent company entitled "General Information & Regulations" in which he had read that the channel of the canal had a depth at mean low water of 25 feet (Petitioner's Exhibit 11; Hammett, Rec. pp. 424-425, Q. 18-24; Morton, J., Opinion, Rec. p. 21; Circuit Court of Appeals Opinion, Rec. pp. 548-549). The publication of this pamphlet was admitted by the Canal Company (Petitioner's Ints. 3-5, Rec. p. 57, and Answers, Rec. p. 68) and had been issued after having been passed upon by the Canal Board of Directors (Belmont, Rec. pp. 539-540, X-Q. 15-26).

This depth of 25 feet was required in the Act incorporating the Canal Company (Massachusetts Acts of 1899, Chap. 448) in which it is stated (§ 3): "Said canal when constructed shall have a depth of not less than 25 feet at mean low water"; and the presence of the Bay Port in the canal on this occasion was due in part to the statement in the pamphlet which if true would have given safe water for the navigation of the Bay Port, which drew loaded 18 feet 2 inches, and also to the personal solicitation of the special agent of the Canal Company aforesaid (Hammett,

Rec. p. 426, Q. 41; pp. 437-438, X-Q. 270-274, 280; Petitioner's Ints. 81-82, Rec. pp. 62-63, and Ans. Rec. p. 72; Morton, J., Opinion, Rec. p. 26; Petitioner's Ints. 1-9, p. 57, and Answers, Rec. pp. 68-69).

As a matter of fact the requirement of the statute was not complied with, *the published statement was untrue and known to be so by the respondent* (Petitioner's Exhibit 1, Rec. p. 244; Petitioner's Exhibit 3, Rec. p. 247; Petitioner's Exhibit 4, Rec. p. 249; Rec. pp. 277-278 and 340; Geer, Rec. p. 525, X-Q. 342). This was admitted by the respondent in open court (Rec. pp. 340-341).

All the witnesses who were asked the question testified that with 25 feet of water under the Bay Port she ought to have navigated the canal safely (Wagner, Rec. p. 231, X-Q. 87-90; Lewis, Rec. p. 179, X-Q. 284; see Scott, Rec. p. 318, X-Q. 214-215; Shelton, Rec. p. 465, Q. 135; Hammett, Rec. pp. 432-433, Q. 185-187). It is certainly significant that, with only two shoals in the canal, this vessel should sheer into the bank within 3 lengths after passing the first shoal spot after traversing half of the distance of the canal in safety and should again sheer into the bank within 6 lengths after passing the second shoal spot, and that in the first instance the tidal current should have been against the steamer and in the second instance in her favor.

Neither the owner of the Bay Port nor her captain had any particular knowledge of the structure of the canal or the rates and tendencies of the currents and eddies at different stages of the tide, nor had they any knowledge whatever of the shoals in this waterway; and even the canal pilot and towboat masters were not informed by the Canal Company of the existence of the latter (Petitioner's Int. 68 and Ans. pp. 61, 71; Crocker, Rec. p. 243, X-Q. 134-136; Wagner, Rec. p. 231, X-Q. 82-87; Smith, Rec. pp. 234-235, X-Q. 44-48; McGilvray, Rec. pp. 225-226, X-Q. 28-31).

We have, therefore, a situation in which the operator of a quasi-public waterway not only knowingly overstated, in its solicitation of business for tolls, the depth of water within said waterway, but also withheld information of the shoals from the owners and operators of vessels using the canal; and, what is inexcusable, concealed the situation from the canal pilots and towboat men in whose hands masters of vessels — strangers in this canal — must necessarily place their vessels for passage through.

Captain Hammett at the entrance to the canal turned his vessel over to a well-known and competent canal pilot (Morton, J., Opinion, Rec. p. 23) and canal tug, remaining in the pilot house to assist the pilot, especially in interpreting the pilot's signals to the engine room, but retaining as was his duty a latent supervision for the safety of his vessel. By reason, however, of his ignorance of the conditions in the canal and the tendencies of its currents and eddies, he relied as was reasonable and proper under the circumstances upon the superior knowledge of the pilot and the towboat master. It was proper for him so to do.

Although Captain Hammett of the Bay Port was 'under a duty to depose the pilot "in case the latter is intoxicated or manifestly incompetent" —

The Oregon, 158 U. S. 186, at 194 ;
see *Bramble v. Culmer*, 78 Fed. 497,

or in case the pilot commits "a palpable and imminently dangerous mistake"—

The Marcellus, Fed. Cas. 2347;

yet in this waterway in which Captain Hammett was ignorant of the force and effect of the currents, swirls and eddies, and the pilot was held forth to him as a man particularly experienced in the canal navigation, it would have been highly improper for him alone to have attempted

to pilot his vessel or to have interfered in the navigation of his vessel by the pilot.

See *The Armonia*, 81 Fed. 227.

Wilson v. Pilots Assn., 55 Fed. 1000.

The China, 7 Wall. 53.

The petitioner White Oak Transportation Company was operating a "staunch vessel properly manned, supplied and equipped" (Morton, J., Opinion, Rec. p. 20); it knew of the canal as it would know of any other shortcut waterway; merely in a general way. It read of the advantages of the canal in the company's public advertisements, listened to the urgent solicitation of its advertising agent who withheld all information of its dangers, and then allowed Captain Hammett to use the canal if he saw fit when the occasion arose.

Without particular knowledge of the dangers other than what are incident to any narrow navigable waterway, it would seem as though the said petitioner were being held to a most extraordinary degree of care to be assumed to have full knowledge of the shoals, knuckles, jagged bottom, currents, swirls and eddies in the canal, and their effects at various stages of the tide upon a deeply laden steamer. Even the pilots and towboat masters as it happened in this case actually had not this full knowledge; nor do the adjudicated cases presuppose this degree of knowledge in owners or operators of vessels using channels to which the vessels have been invited.

In

The Calvin P. Harris, 33 Fed. 295 (Mass. Dist.),

a schooner in hauling into a dock grounded on a shoal in the dock. This shoal was caused by the backwater of a mill-pond which flowed into the dock carrying silt with it. The bar had been formed twice before and been removed by the respondent. The master and pilot knew that the

bar existed but did not think it had grown again so as to be dangerous, although the officers of the respondent company had knowledge of its existence and extent. Judge Nelson held:

“ They (the master and pilot) had the right in the absence of positive knowledge to the contrary to rely upon the direction of the company's agent to discharge at the coal wharf as an assurance that the bar had not increased, and that the dock was safe and free from obstructions so far as it was the duty of the company to make it so.”

It was held similarly by Judge Nelson in

The Annie R. Lewis, 50 Fed. 556 (Mass. Dist.).

In

Hartford & N. Y. Trans. Co., 125 Fed. 981 (So. Dist. N. Y.),

where a vessel was damaged by a rock in a dock, it was held by Judge Adams that a general notice by the wharfinger to the master of the vessel that he must be responsible if anything happened in the dock, had no effect whatsoever in establishing the contributory negligence of the vessel.

Likewise in

Philadelphia & R. Ry. Co. v. Walker, 139 Fed. 855 (N. H. Dist.),

which was a libel for damages to a barge lying in the dock of the respondent due to a shoal in the dock, after holding the dock owner responsible, Judge Hale says:

“ It now becomes necessary to inquire whether or not the libellant was at fault. . . . Under the circumstances of this case the testimony forces me to the conclusion that the master was justified in relying

upon the statement of the respondent, and was under no duty to take soundings."

And in

Look v. Portsmouth K. & Y. St. Ry., 141 Fed. 182
(Maine Dist.),

Judge Hale held that the master of a vessel who had placed her in a dock in contact with electric wires setting the craft afire, was under no duty to investigate the effect of placing the vessel's chains against the electric wires, and that he had a right to rely upon the duty of the respondent to make the premises reasonably safe.

In the recent case of

P. Dougherty Co. v. Bader Coal Co., 244 Fed. 267
(Mass. Dist.),

the barge Maine was chartered to take a load of coal to a dock in the Kennebec River near Augusta, and was guaranteed 12 feet of water. She was much the largest vessel that had ever been there, and was too long to be properly accommodated, and while being turned in the dock to accommodate herself to the unloading apparatus, she grounded in water of less than 12 feet in depth. Judge Morton held that the fact that the vessel was too large was "obviously something for which the owner of the barge was not in any way responsible" (p. 268).

"The charterers were bound to know that the vessel which they chartered was too long to discharge at the dock in the ordinary way and would have to be turned during the discharge." (Page 271.)

The respondent was held solely at fault.

These are all cases of condition of docks, but the right of the owner or operator of a vessel to assume that the place to which the vessel is invited and the approaches

thereto are reasonably suitable and safe is as applicable to a canal as a dock.

Wherefore, the petitioner White Oak Transportation Company submits that it had a right to assume that the respondent's waterway into which the Bay Port was invited and admitted, was reasonably suitable and safe, and that the District Court was correct in its finding that the owner of the Bay Port "*can hardly be held to be negligent for accepting the invitation of libellant (Canal Company)*" (Morton, J., Opinion, Rec. p. 26).

III. THE CIRCUIT COURT OF APPEALS ERRED IN NOT HOLDING THAT THE NEGLIGENCE OF THE CANAL COMPANY IN INVITING AND ALLOWING THE STEAMER BAY PORT TO ATTEMPT PASSAGE OF ITS CANAL CONTINUED AS A PROXIMATE CAUSE OF THE LOSS OF THE BAY PORT AND HER CARGO.

The District Court, not having found that the Canal Company or the vessel-owner was negligent in allowing the Bay Port to enter the canal, was not called upon to consider the effect of this negligence upon either stranding. The Circuit Court of Appeals *per curiam* found that the Canal Company was negligent in inviting and allowing the Bay Port to enter the canal and held that this negligence was a contributing cause of the first stranding. The court, however, was divided on the effect of this negligence upon the second stranding,—two judges held that this negligence of the Canal Company did not contribute to the second stranding, and one judge held that it did.

It is apparent that the Circuit Court of Appeals has reviewed this case from a common law and not an admiralty point of view, as is shown by its obvious error in not dividing the damages upon finding both parties at fault in the first stranding, and we respectfully submit that the

question of proximate or contributing cause is likely to receive from the common law point of view a treatment less equitable than that given under the admiralty practice, where both parties may be held at fault and the damages divided.

The damage by the first stranding is appreciable, but small in comparison with the total loss of the Bay Port, which occurred in the second stranding, and the same situation holds with reference to the cargo. In the first stranding, the latter was damaged by wetness, and a small part of it jettisoned. In the second stranding it became a total loss.

It seems, therefore, proper that this Court should review the facts of the case and determine from the admiralty point of view whether or not this initial negligence of the Canal Company continued as a fault in the loss of the Bay Port and her cargo.

(a) The First Stranding.

The Bay Port had appeared at the Wings Neck entrance to the canal and signaled for passage through. The permit signal was given under the direction of the canal superintendent Geer (Geer, Rec. p. 341, X-Q. 122) and the Bay Port assisted by a canal tug upon a hawser ahead, and in charge of a canal pilot, entered the Buzzards Bay approach channel. She progressed satisfactorily through the first two bridges into the long stretch between the Bourne and Sagamore bridges (Morton, J., Opinion, Rec. p. 21); in fact no difficulty was experienced in her navigation until after she had passed over the first shoal (Morton, J., Opinion, Rec. pp. 20-21; Hammett, Rec. p. 427, Q. 75; p. 428, Q. 85, p. 436, Q. 250-252; Shelton, Rec. p. 461, Q. 53; Hart, Rec. p. 411, Q. 30-40; p. 412, Q. 42-46, 50-51; p. 415, Q. 104; L. Maker, Rec. p. 484, Q. 19-23; Rochester, Rec. p. 263, X-Q. 110; Lecompte, Rec. p. 188, Q. 8; p.

199, X-Q. 142-145; p. 200, X-Q. 167; Brennan, Rec. p. 397, X-Q. 63; Geer, Rec. pp. 341-342, X-Q. 131-133; p. 342, X-Q. 141-145; Canal Company Exhibit 24, report of Pilot Lewis). The two lower courts were of the opinion that this shoal was not in itself a proximate cause of the first stranding, but the Circuit Court of Appeals held that the negligence of the Canal Company in soliciting and permitting the Bay Port to enter the canal, under the circumstances of this case, one of which was the existence of this shoal, did constitute a fault of the canal company.

This shoal was at a point about half the distance through the canal where other vessels had sheered and been lost, and was known as the "graveyard" of the canal (Geer, Rec. p. 337, Q. 82; see Murphy, Rec. p. 516, Q. 12). It was at a depth of 19½ feet at mean low water (Morton, J., Rec. p. 22; Circuit Court of Appeals Opinion, Rec. p. 551; Bay Port, Exhibit 1, Rec. p. 244), and at the time of the stranding, being half tide, between 21 and 22 feet (Morton, J., Rec. p. 22; Circuit Court of Appeals Opinion, Rec. p. 551). Its size is indicated by the fact that after the stranding of the Bay Port the dredge Kennebec took out 1,350 square yards of earth (Rec. p. 455).

The Bay Port drew 18 feet 2 inches (Morton, J., Opinion, Rec. p. 22; Circuit Court of Appeals Opinion, Rec. p. 548). *This gave a clearance of from 2 feet 10 inches to 3 feet 10 inches under the Bay Port.* In open and still water there is no doubt that this is sufficient clearance. The canal, however, is a narrow waterway with jagged bottom and irregular sides (Petitioner's Exhibits 9, 1, 2, 5 and 6) and through it courses a strong tidal current with cross-swirls and eddies.

It is a well-known phenomenon that when a vessel runs into shallow water she "smells the bottom", sheers and becomes unmanageable (Reeve, Rec. p. 498, Q. 30; Wilson, Rec. p. 154, X-Q. 133-134; Lecompte, Rec. p. 202, X-Q.

190-191; Dunton, Rec. p. 421, Q. 37-38; Scott, Rec. p. 318, X-Q. 214-215; Wagner, Rec. 232, X-Q. 94-95; Hammett, Rec. p. 428, Q. 99).

This is judicially recognized.

Boston, Cape Cod & New York Canal Co. v. Seaboard Trans. Co., 270 Fed. 525.

The Ralph Creyke, 55 L. T. (N.S.) 155.

The District Court in some manner fell into the error of assuming that three feet of water gave sufficient clearance. It states:—

“The evidence for the Bay Port is that, unless a vessel like her has from *three* to five feet of water under her bottom, she is likely to ‘smell the ground’ as it is called, which interferes with her steering and may cause her to sheer.” (Italics ours.)

(Morton, J., Opinion, Rec. p. 22.)

And the Circuit Court of Appeals, apparently without analyzing the evidence, has accepted the minimum or three feet estimate, as a basis for its computation.

This finding has absolutely no basis upon the evidence. The only witnesses to whom the Honorable Judge of the District Court could have referred were Hammett, Dunton, J. Maker and B. Kemp. These witnesses all regarded a clearance of at least five feet necessary (Hammett, Rec. p. 428, Q. 100-101; Dunton, Rec. p. 421, Q. 39; J. W. Maker, Rec. p. 359, Q. 74-75; B. Kemp, Rec. p. 393, X-Q. 61-63). *Apparently no less a clearance than five feet was deemed advisable by the Canal Company, for its advertisements for vessels passing through the canal limited the maximum vessel depth at 20 feet* (Coakley, Rec. p. 300, X-Q. 197-201; Petitioner's Ints. 6-9, and Answers, Rec. pp. 57 and 68-69), *while its circular of information gave the depth at mean low water as 25 feet* (Petitioner's Exhibit 11).

While this Court is reluctant to disturb a finding of fact made by both lower courts, it should not hesitate to make a correction of an obvious error, especially when it bears upon so important an issue in the case.

In

The Sapphire, 11 Wall. 164,

this Court stated: —

“It is not our general practice to scrutinize very carefully the weight of evidence in cases of collision where the evidence is substantially conflicting and where both District and Circuit Courts have concurred upon a decree upon the merits, but this case depends upon a narrow point, the evidence on which is in our view so decidedly averse to the sole liability of the *Sapphire* that it becomes our duty to notice it.”

The court then analyzed the evidence and reversed the decree.

In

The Baltimore, 8 Wall. 377,

this court said in considering the question of whether there had been a total loss: —

“Where the appeal involves a question of fact, the burden is on the appellant to show the decree in the subordinate court is erroneous. But it is a mistake to suppose that this court will not re-examine the whole testimony in the case.”

The Supreme Court then reversed the decree of the subordinate court.

See also

The Lady Pike, 21 Wall. 1.

The testimony was uncontradicted that the effect of a shoal upon the bottom of a vessel is to throw her into

unstable equilibrium. When in this situation the primary deflecting force may be a very small one to cause a sheer (Reeve, Rec. p. 510, Q. 150), and the deflection comparatively slight to run into the bank. If the course of the Bay Port were deflected only one point when in the centre of the channel, she would collide with the bank in two of her lengths (Reeve, Rec. pp. 506-507, X-Q. 110-112).

The action of the Bay Port after she left this shoal bears out this theory of unstable equilibrium. At the time she passed over this shoal she was in the centre of the channel (L. Maker, Rec. p. 494, Q. 181-183). The effect of the shoal was first noticed by a slackening of the towing line between the steamer and the tug ahead (Lecompte, Rec. p. 199, X-Q. 145-146). This was probably due to the fact that the shoal had caused a suction between it and the bottom of the steamer and consequently a harder pull on the tug; and when the shoal was passed and the suction released, the effect was to snap the steamer ahead and slacken the hawser. After this slackening of the hawser the Bay Port was seen to take a little sheer toward the north bank (Morton, J., Opinion, Rec. p. 21). This sheer was easily broken, but the vessel seemed to hang to the north bank of the canal (L. Maker, Rec. p. 484, Q. 23). This hanging to the bank would be the natural resultant of the forces of the sheer on one side and her rudder and the tug on the other, or it might have been due to the fact that a vessel steers by the swing of her stern and in the shoal water the stern would not swing until it had passed over the shoal. While in this position, with forces exerted on her from various directions, there was applied upon her port bow the pressure of the water shot off from the knuckle (Morton, J., Opinion, Rec. p. 22) and being, in this instability, sensitive to extraneous forces, she took the sudden sheer to starboard which is described by all the witnesses.

When she took this sheer to the south bank the wheel was put by degrees to starboard until it was hard over, but she had gone so far toward the south bank that she caught on a boulder on the bank, though she had at that time swung very nearly parallel with the bank (L. Maker, Rec. p. 484, Q. 26-31), and she struck about one and a half of her lengths from where this sheer started (Morton, J., Opinion, Rec. p. 21).

The description of the first grounding by the canal pilot in charge of the Bay Port, Captain Rochester, given before the United States Local Inspectors shortly after the grounding occurred, is that he was watching her very closely, and, when he saw her sheer to the southern bank, he ordered her helm to starboard, starboard some more, then hard astarboard, blew an alarm whistle for the Dalmazelline to pull the ship's bow to port to break the sheer, which was responded to at once. Finding that this had no effect on the Bay Port, he ordered her engines full speed astern, which checked her headway some, but she continued on and struck the south bank of the canal (Rochester, Rec. pp. 263-264, X-Q. 110-111).

The Honorable Judge of the District Court has suggested that under the pilot's orders too much port helm may have been given to the Bay Port while she was clinging to the port bank after her first sheer (Morton, J., Opinion, Rec. p. 22). Yet no navigator or other witness in the case has so testified. The captain and pilot of the tug and the captain of the Bay Port all commend the handling of the Bay Port by Captain Rochester (Lecompte, Rec. p. 201, X-Q. 173-175; Lewis, Rec. p. 169, X-Q. 141; Hammett, Rec. 429, Q. 106), and no negligence of anyone aboard the Bay Port is alleged in the pleadings or allegations of faults (Circuit Court of Appeals Opinion, Rec. p. 552). *In fact the Canal Company affirmatively pleaded that the vessel had become unmanageable and all proper*

steps were taken to check the sheers and enable her to recover her course on both days (Libel of respondent against petitioner, Rec. pp. 34 and 35; amended answer of respondent to libel of petitioner Rec. pp. 88-89). This amended answer was filed nearly a year after the libel was filed.

In admiralty cases where the pleadings may be read as admissions, it is well settled that the respondent's case must correspond with his pleadings. As the court says in

Barber v. Lockwood, 134 Fed. 985, 986 :

"The parties make up their issues and must stay by them until the end . . . allusion is made to the matter now for the benefit of proctors hereafter."

As was stated by Addison Brown, J., in

The Aurania and The Republic, 29 Fed. 98, bottom p. 116:

"A party is not allowed any considerable departure from such deliberate allegations in its pleadings, under the exigencies of the trial, except on satisfactory explanation and clear proof, which certainly do not exist here."

See also

McKinley et al. v. Morrish et al., 21 How. 343.

The Yankee, 203 Fed. 73.

It would be inequitable for the Canal Company to frame its pleadings exonerating the pilot from negligence, and then, after the evidence was all in and the libellant had laid no stress upon this point, to take a position exactly opposite to its pleadings. The respondent should be barred, under the principles of equitable estoppel. At least such a change of position should be scrutinized and allowed only after clear and convincing proof.

The District Court is undecided as to what caused the first stranding and states that it was "due either to pure accident or to faulty navigation by the pilot" (Morton, J., Opinion, Rec. p. 23). His indecision is shown further when he summarizes the case where he says: "No charges are made here by any party against the pilots; their conduct need not be further scrutinized" (Morton, J., Opinion, Rec. p. 25). The Circuit Court of Appeals has refused to adopt either suggestion of the District Court as the cause of the first stranding (Circuit Court of Appeals Opinion, Rec. p. 552).

The Bay Port was 265 feet long (Morton, J., Opinion, Rec. p. 20). She was proceeding over the bottom about 3 knots against a head current of about 3 knots (Morton, J., Opinion, Rec. p. 20; Circuit Court of Appeals Opinion, Rec. p. 549), and she hit the bank about 1,000 feet from where the shoal terminated (Morton, J., Opinion, Rec. p. 22; Circuit Court of Appeals Opinion, Rec. p. 551). The vessel, therefore, proceeded about 735 feet after her stern left this shoal spot before striking the bank, *i. e.*, two and two-thirds of her lengths. It was the opinion of all those on board the Bay Port at the time that she sheered by reason of meeting shoal ground (Rochester, Rec. p. 265, X-Q. 118; Hammett, Rec. p. 428, Q. 98-99; Shelton, Rec. p. 465, Q. 133; p. 472, X-Q. 255; L. Maker, Rec. p. 485, Q. 36). This was no doubt the opinion of Captain Lecompte of the canal tug (Lecompte, Rec. p. 200, X-Q. 157-158), and all the witnesses in the case who were asked the question stated that if there were 25 feet of water under the Bay Port she ought to have navigated the canal safely (Wagner, Rec. p. 231, X-Q. 89-90; Lewis, Rec. p. 179, X-Q. 284; see Scott, Rec. p. 318, X-Q. 214-215; Shelton, Rec. p. 465, Q. 135; Hammett, Rec. pp. 432-433, Q. 185-187). It is certainly significant that having proceeded satisfactorily to this point (Morton, J., Opinion, Rec. p. 21) the Bay Port

should immediately after leaving this shoal take two sheers and strike the bank within three of her lengths.

Clearly it was negligent on the part of the Canal Company to allow this shoal to make up, the knuckle to remain projecting into the canal, and the sides and bottom of the canal to exist so irregular.

Otis v. I. M. Luddington's Sons, Inc., 229 Fed. 454.
Garfield & Proctor Coal Co. v. Rockland-Rockport Lime Co., 184 Mass. 60.

Nickerson v. Tirrell, 127 Mass. 236.

And as the Honorable Judge of the District Court said in
Boston, Cape Cod & New York Canal Co. v. Staples Trans. Co., 246 Fed. 549:

"The fact that this dangerous obstruction so near the channel had existed for months would be in itself I think sufficient to warrant a finding of negligence."

This latter opinion was applied to a shoal that was not known to exist, but which actually had existed since the canal was excavated. It is particularly applicable to the present case, where the shoal, knuckle and extreme irregularity of the sides and bottom of the canal were well known to the Canal Company.

Both the District Court and the Circuit Court of Appeals held that this first shoal alone was not the proximate cause of the first stranding. Both of these conclusions were founded upon an erroneous assumption that the vessel could proceed safely in this waterway with three feet of water under her, and with the correction made, based upon the evidence that 5 feet were needed under the steamer, this clearance of 2 feet 10 inches to 3 feet 10 inches was clearly insufficient.

This first shoal was, therefore, at the least, a material factor in the negligence of the Canal Company, which the

Circuit Court of Appeals found was a proximate cause of the first stranding. It is, we submit, in itself, in view of

The Pennsylvania, 19 Wall. 125,

a proximate cause of the first stranding.

The events occurring while the Bay Port lay aground in her first position are as follows: the first stranding was at about 2.15 P. M., December 13, 1916. Distress signals were immediately blown, and the tugs John C. Stuart and Hazelton appeared. They, assisted by the Dalzelline, which had had the Bay Port in tow, and also by the engines of the Bay Port, attempted to pull the steamer from her stranded position, but without success. Captain Hammett of the Bay Port immediately communicated with the operating agent at Boston, who upon the telephone engaged The T. A. Scott Company, Inc., a professional wrecker, to attempt salvage of the steamer. Captain Joseph Lewis, an experienced wrecking master (Circuit Court of Appeals Opinion, Rec. p. 549) of the salvor company, took the 4 o'clock train from Boston to Buzzards Bay, reached there early that evening (Morton, J., Opinion, Rec. p. 23), promptly surveyed the situation, made examination by a diver during the night, ordered the tugs to hold the steamer to the bank, caused the diver to plug the hole in her bottom, pumped her out in so far as her wet cargo would allow, and was in the act of jettisoning her cargo of coal from No. 2 hatch, when at 10.15 o'clock the next morning the steamer Bay Port suddenly floated and began to drift to the eastward with the current (Morton, J., Opinion, Rec. p. 23; Circuit Court of Appeals Opinion, Rec. p. 550, top). This was several hours before it was anticipated that she would come afloat, but steam was up, three towboats and a wrecking lighter were beside her (Morton, J., Opinion, Rec. p. 23), her captain and other officers and crew and a canal pilot were by.

There is no contention in the case that the petitioner did not seasonably and properly take steps for the relief of the vessel in her stranded position, and the salvor, who had charge of the vessel up to the time she came afloat, has been absolved from blame by both lower courts. Therefore no intervening cause thus far has appeared, unless we take what was suggested by the Honorable Judge of the District Court as a mere possibility,—that the pilot tried to break the first sheer with too much port helm, which, we submit, for the reasons above stated, is unjustified upon the evidence and pleadings and at the most is a mere error of judgment *in extremis* which does not break the train of causation originated when the Bay Port was admitted into the canal.

There remains for consideration that portion of the trip of the Bay Port from the time she came afloat until the second stranding occurred.

(b) The Second Stranding.

The District Court has held that the second accident was inevitable and that the navigators of the Bay Port were in no way to blame in the handling of the vessel from the time she came afloat until the second stranding.

The Circuit Court of Appeals, however, found that the master of the Bay Port was negligent in not taking command of his vessel away from the pilot and making use of the three tugs to hold his vessel in the canal in the swift current, in not tying up to certain dolphins and in not readjusting her cargo and trim, and these three acts of omission are imputed to the petitioner, and it seems are held to be the sole, proximate cause of the second stranding; for the Circuit Court of Appeals exonerates the Canal Company on the ground that though it was at fault in permitting the Bay Port to enter the canal and strand on the first occasion, yet it did not assent to the Bay Port under-

taking the navigation of the canal in the condition in which she was when she came afloat (Circuit Court of Appeals Opinion, Rec. p. 554).

In this latter statement the Circuit Court of Appeals has entirely overlooked the testimony of Captain Geer, the superintendent of the Canal Company, who, acting under the rules and regulations of the Canal Company reserving a right in the Canal Company to superintend the salvage of vessels in the canal, issued an order to his assistant, William Lewis, to "get her out of the canal as soon as possible" (Geer, Rec. p. 338, Q. 90-91; p. 340, Q. 112-114; p. 343, X-Q. 146). Captain Geer had gone to the scene of the stranding shortly after it had occurred (Geer, Rec. p. 337, Q. 80-83; Circuit Court of Appeals Opinion, Rec. p. 549) and knew at the time that the Bay Port was leaking (Geer, Rec. p. 338, Q. 89). This order to Captain William Lewis was given that night after the hold of the vessel had partly filled with water, and it may be assumed that Captain Geer knew that the wet cargo would give the steamer a poor trim for navigation.

The Canal Company has contended that the pilots and towboats operating in the canal were not agents of the Canal Company, and the Honorable Judge of the District Court has found, though as he admits unnecessary to his decision, that generally neither the pilots nor the tugs were agents or servants of the Canal Company (Morton, J., Opinion, Rec. p. 20). The towboats and pilots had formerly been in the employ of the Canal Company (Morton, J., Opinion, Rec. p. 20; Circuit Court of Appeals Opinion, Rec. p. 549). The Pilots Association, of which both pilot Rochester and pilot Lewis were members, was organized by the officers of the Canal Company, and its superintendent, Captain Geer (Lewis, Rec. p. 174, X-Q. 206; Geer, Rec. p. 333, Q. 22-23) and Captain Geer was its manager (Geer, Rec. p. 333, Q. 22-23). Likewise the Cape Towing Corpo-

ration, operating the tugs, had the same officers and offices as the Canal Company (Coakley, Rec. pp. 294-296, X-Q. 115-145), and Captain Geer was its manager (Geer, Rec. p. 334, Q. 24-27). Both organizations whether legally distinct or not were mere subterfuges to relieve the Canal Company of liability (Morton, J., Opinion, Rec. p. 20). It is immaterial what was the relation generally between the Canal Company and the pilots, for the circumstances of this case clearly make Captain William Lewis, in connection with his acts in piloting the Bay Port after she came afloat, an agent of the Canal Company. He was specially deputized by Superintendent Geer the night before to get the Bay Port out of the canal as soon as possible (Geer, Rec. p. 338, Q. 90-91; p. 340, X-Q. 112-114; p. 342, X-Q. 146; see Morton, J., Opinion, Rec. p. 24). He attended the conference the evening before with Captain Hammett and the salvor representative Captain Joseph Lewis, and agreed with them at the time that the only proper thing to do was to take the Bay Port through the canal as soon as she could be floated (Morton, J., Opinion, Rec. p. 24; Hammett, Rec. pp. 446-447, X-Q. 408-415 and 422-423). The next day he displaced pilot Rochester, who had taken the Bay Port to the point of the first stranding, boarded the Bay Port not at the request of Captain Hammett of the steamer, but of Superintendent Geer of the Canal Company, and was, we submit, acting solely as a deputy of Superintendent Geer and as agent of the Canal Company from the time the steamer came afloat until she stranded on the second occasion. The Honorable Judge of the District Court referring to the suggestion that the steamer be tied up to dolphins says:—

“I have no doubt that in failing so to deal with her pilot Lewis had in mind Captain Geer’s instructions to get out of the canal if possible”—

(Morton, J., Opinion, Rec. p. 27);

the Circuit Court of Appeals, however, seems to have considered merely the general relation between the pilots and the Canal Company and overlooked the special relation of Captain William Lewis on this occasion.

There was, we submit, not only assent by the Canal Company to the Bay Port being in the canal in the condition in which she came afloat, but there was a direct and authorized order for her to be taken through the canal, issued by the canal superintendent to Captain William Lewis, who for this occasion at least was acting as agent of the Canal Company.

The Circuit Court of Appeals, in finding that Captain Hammett of the Bay Port should have held his vessel by tugs in the channel of the canal, bases this finding solely upon replies to theoretical questions to the effect that *three* tugs could have held this vessel in the current of the canal after she came afloat. *As a matter of fact, at no time were three tugs available, or even two tugs.*

When the Bay Port, heading eastward, so unexpectedly slid off the bank, the wrecking lighter Salvor was alongside with three tugs, the Dalzelline, Hazelton and John C. Stuart, headed to the westward (Wagner, Rec. p. 230, X-Q. 67; Circuit Court of Appeals Opinion, Rec. p. 549). One of these tugs, the John C. Stuart, was immediately ordered to take care of the wrecking lighter to prevent her from going ashore. This was done, the lighter being towed to the westward (A. Smith, Rec. p. 233, Q. 27), and at no time was this tug able to do anything else. The second tug, the Hazelton, had also at first gone to the aid of the wrecking lighter, but changed to help the Bay Port, and, being a slow handling boat, damaged her propeller in contact with the bank of the canal, and at no time was she able to get a line on the Bay Port prior to the second stranding (Wagner, Rec. pp. 228-229, Q. 31-37, 41-42, 51). The Dalzelline took a line from the bow of the Bay Port and proceeded through the canal as on

the previous day. No one testified that one or even two tugs would have held the Bay Port in the swift current of this narrow waterway in the trim in which she was when she came afloat. It was furthermore contrary to the plan of operation agreed upon after deliberation the evening previous by the master of the Bay Port, the canal pilot and representative and the salvor that the steamer should be taken through to the eastern end of the canal as soon as possible after she floated (Morton, J., Opinion, Rec. p. 24; Hammett, Rec. pp. 446-447, X-Q. 408-415; X-Q. 422-423).

The second suggestion by the Circuit Court of Appeals was that the Bay Port should have been tied up to dolphins. These dolphins referred to by the Circuit Court of Appeals were groups of piles driven into the bottom on the northern edge of the channel. They were situated about 1,000 feet from where the Bay Port was first ashore (Circuit Court of Appeals Opinion, Rec. p. 553). The Bay Port was in a 3 to 4 knot current (Morton, J., Opinion, Rec. p. 23; Circuit Court of Appeals Opinion, Rec. p. 552), and started her engines soon after she came afloat (Hammett, Rec. p. 445, X-Q. 383-387). Proceeding over the bottom at even four knots she would pass these dolphins in less than three minutes after she came afloat. They were situated along the northerly edge of the channel of the canal and undoubtedly presented a danger in their approach by this logy vessel; after deliberation of the whole question the evening before all the experts had deemed it advisable to continue without stopping through to the eastern end of the canal and there tie up to the regular mooring dolphins and this was the order of Superintendent Geer of the Canal Company to his assistant (Geer, Rec. p. 338, Q. 90-91; p. 334, Q. 24-28; p. 340, Q. 112-114; p. 342, X-Q. 146). Also, as the Bay Port went adrift, pilot Lewis and salvor Lewis agreed, in so

far as they could in the excitement, that the boat should be taken to the Sandwich end (Wagner, Rec. p. 229, Q. 53; p. 230, X-Q. 71-72), and the District Court has found:

"It does not appear that Captain Hammett knew about the dolphins before reaching them, and he testified that even now he could not say whether it would have been safe to tie the Bay Port to them or not, a statement which I believe. Considering all the circumstances, I think Captain Hammett was not negligent for not preventing pilot Lewis from attempting to take the ship through to Sandwich."

(Morton, J., Opinion, Rec. p. 27.)

The third suggestion of the Circuit Court of Appeals,—of readjusting the cargo of the vessel,—originated in the minds of the Circuit Court of Appeals. None of the many marine experts in the case was even asked whether or not this could have been done, nor has it even been suggested heretofore in the case, and the impracticability of it can be seen from the fact that it would have necessitated derrick lighters, booms, a sizable scow and hoisting machinery, of which there were none of sufficient capacity available in the canal, and even if the vessel were lightered forward, the water which had filled her hold the night before and had permeated all parts of her soft coal cargo would, when her bow came up, have seeped aft, rendering a navigable trim impossible.

If Captain Hammett had taken command of his vessel away from the canal pilot and ordered her held in the canal by tugs until she was tied up to dolphins or until her cargo was trimmed as suggested by the Circuit Court of Appeals, he would thereby have acted contrary to the order of the canal superintendent (Geer, Rec. p. 340, Q. 112-114; p. 342, X-Q. 146) and in so doing, Captain Ham-

mett would have made breach of the contract under which passage of the canal was being made.

The attempted passage of the steamer Bay Port through the canal was by virtue of a contract for the consideration of tolls, the terms of which were in part stated in the regulations of the respondent entitled "General Information and Regulations" (Petitioner's Exhibit No. 11) which pamphlet had been read by Captain Hammett of the Bay Port on a previous trip through the canal. This pamphlet prescribes (p. 13, § 12) : —

"In the event of grounding, the canal authorities shall have the right to direct all operations for floating the vessel."

(Circuit Court of Appeals Opinion, Rec. p. 549.)

Under the authority of this provision, Superintendent Geer of the Canal Company ordered the Bay Port to be taken out of the canal as soon as possible to the eastern or Sandwich Bay end. His testimony on this point is as follows : —

"Q. 90. What instructions, if any, did you give to any of them as to what to do if she came off? A. To get her through the canal just as soon as possible.

Q. 91. To whom did you give that instruction? A. Pilot Lewis."

(Geer, Rec. p. 338.)

"Q. 112. I understood you to say that on the afternoon of the 13th, when the three tugs were trying to get her off, you gave instructions that if she came off into the canal they were to get her in the channel and get her out of the canal as soon as they could? A. Get her out of the canal as soon as possible.

Q. 113. At that time you did not know how serious

the leak was or what the damaged condition was on her starboard side at all? A. No, sir.

Q. 114. And you did that before any examination had been made to see the extent of her damage? A. Yes, sir."

(Geer, Rec. p. 340.)

"X-Q. 146. You say that you gave orders to get her out as quick as possible, out of the canal? A. Yes, sir; that first night she went ashore."

(Geer, Rec. p. 342.)

Captain Geer had had the experience of having the canal blocked when the tug Watuppa and the collier William Chisholm grounded and sank in the canal, and as a burned child dreads the fire, he was undoubtedly influenced by these previous disasters in issuing the order that the boat be taken as quickly as possible out of the canal. Captain William Lewis immediately the vessel was afloat began to carry out this order of Captain Geer (Hammett, Rec. p. 444, X-Q. 373-389; Lewis, Rec. p. 163, Q. 62-65).

If Captain Hammett had done as the Circuit Court of Appeals says he should have, then these acts would have been contrary to the order of Superintendent Geer and would have constituted a breach of the contract of passage of the Bay Port through the canal. The petitioner White Oak Transportation Company therefore submits that, aside from the question of expediency in holding the vessel in the canal, her master was under a duty to perform the terms of his contract in so far as it was reasonably possible, and allow his vessel to be taken to the eastern end of the canal in compliance with the order of the canal superintendent.

In consideration of these suggestions of the Circuit Court of Appeals, it is material that the pleadings of the respondent charge no faults against either Captain Ham-

mett or Captain William Lewis. As is stated by the Honorable Judge of the District Court :

“ The Canal Company’s libel does not charge negligence in the management of the steamer while she was in the pilot’s charge after she came off the bank ; and no such contention has been made by it.”

(Morton, J., Opinion, Rec. p. 26.)

When the Bay Port came afloat and had taken on steerageway she was down by the bow 18 inches more than her previous draft of 17 feet 8 inches (Morton, J., Opinion, Rec. p. 22 ; Circuit Court of Appeals Opinion, Rec. p. 550). She therefore drew forward 19 feet 2 inches and she was listed 15 inches to port (Morton, J., Opinion, Rec. p. 23 ; Circuit Court of Appeals Opinion, Rec. p. 550). While she was logy and did not navigate with the same facility as when in proper trim, nevertheless she succeeded in proceeding with safety for a mile (Circuit Court of Appeals Opinion, Rec. p. 550) until she had passed over the second of the two shoal spots in the canal.

According to the finding of the Honorable Judge of the District Court, which was accepted apparently without examination of the testimony by the Circuit Court of Appeals, the second shoal had over it at mean low water 20 feet, and at the time of the second stranding, the tide being one-half up, 23 feet (Morton, J., Opinion, Rec. p. 25 ; Circuit Court of Appeals Opinion, Rec. p. 551).

Here again both courts seem to have erred. The existence of these shoal places was denied on oath by the Canal Company until it was compelled by order of the court to produce its plans (Ans. to Petitioner’s Ints. 58 and 66, Rec. pp. 61 and 71 ; Interlocutory Opinion, Rec. p. 76).

A glance at the blueprint giving soundings of June 13, 1916 (Bay Port Exhibit 3, Rec. p. 247), shows many depths of less than 20 feet mean low water, and one of 18.2 feet

between stations 193 and 194, and the report of soundings taken November 18, 1916, only a few weeks previous to the stranding (Bay Port Exhibit 4, Rec. p. 249), shows between stations 192 and 193 *18.2 feet for at least one-half of the 100-foot line*, and the presumption is that the shoal had grown further in the period from November 18 to the date of the stranding, December 13, 1916.

The finding of both courts that there were 20 feet at mean low water is therefore an error, and should be corrected by this Court. Likewise it seems incorrect to add 3 feet for the rise of tide. It was half tide (Morton, J., Opinion, Rec. p. 25; Petitioner's Int. 74 and Ans. pp. 62, 72) and the full rise is only 4 to 4½ feet (Crocker, Rec. p. 253, X-Q. 210-211; Dunton, Rec. p. 276, Q. 82; Petitioner's Int. 78, p. 62, and Ans. Rec. p. 72; Morton, J., Opinion, Rec. p. 22). However, taking for the moment the findings of both lower courts that there were 23 feet of water over this second shoal at the time of this second stranding, there was not the five feet necessary clearance for the safe navigation of the Bay Port in the canal. If the canal *had been dredged to a depth of 25 feet in accordance with the statutory requirement, the Bay Port would have gone through, trimmed as she was, without difficulty*. This was the testimony of all who were asked the question (Wagner, Rec. p. 231, X-Q. 87-90; Lewis, Rec. p. 179, X-Q. 284; see Scott, Rec. p. 318, X-Q. 214-215; Shelton, Rec. p. 465, Q. 135; Hammett, Rec. pp. 432-433, Q. 185-187). The movements of the Bay Port after she passed this shoal seem natural and probable consequences of the unstable equilibrium caused by a shoal.

Soon after passing this shoal she sheered slightly to starboard, narrowly missing the lighter Trilby which was at work in the canal. This sheer was broken by aid of the tug and the steamer's helm (Morton, J., Opinion, Rec. p. 25). She then sheered abruptly to the port bank and

struck about 2,000 feet east of this second shoal (Morton, J., Opinion, Rec. p. 25; Circuit Court of Appeals Opinion, Rec. p. 551), swung her stern across the canal, released her bow, filled, and sank diagonally off the southern bank (Circuit Court of Appeals Opinion, Rec. p. 550).

The fact that the steamer stranded at a greater distance from the shoal on the second occasion than on the first, instead of being a reason for holding that the shoal was not the proximate cause, as both lower courts seem to argue, should lead to exactly the opposite inference. The distance is twice in the second case what it was in the first, but the vessel was proceeding against the current in the first instance and with the current in the second, and was proceeding over the bottom at 3 knots at the time of the first stranding (Morton, J., Opinion, Rec. p. 20; Circuit Court of Appeals Opinion, Rec. p. 549), and at six knots at the time of the second stranding (Morton, J., Opinion, Rec. p. 25). It is but natural to suppose that she would, after becoming in unstable equilibrium, proceed on the second occasion twice as far before striking the bank as she went on the first occasion. The fact that she did, is consistent proof that the shoals were material factors in causing both strandings. In fact, under

The Pennsylvania, 19 Wall. 125,

they are *prima facie* the proximate causes of both strandings.

The Circuit Court of Appeals has taken a most unwarranted position upon this important question of whether the negligence of the Canal Company in inviting and allowing the Bay Port to enter the canal was a proximate cause of the second stranding. It has held clearly that the negligence of the Canal Company in inviting and allowing the Bay Port to enter the canal was (with the identical negligence of the owner of the steamer) the cause of the

first stranding. It finds fault in no one while the Bay Port was grounded, and yet says :

“ We do not find any evidence that the Canal Company assented to her undertaking the navigation of the canal in the condition in which she was when she slid off the bank.”

(Circuit Court of Appeals Opinion, Rec. p. 554.)

Pray what caused this condition of abnormal trim if it was not this negligence of the Canal Company ? No other agent has broken the causal connection,— at least the Circuit Court of Appeals found none, and the Circuit Court of Appeals does find that the condition of the Bay Port when she floated “ was one of the causes that directly contributed to her second stranding ” (Circuit Court of Appeals Opinion, Rec. p. 556). The petitioner White Oak Transportation Company respectfully submits that the negligence of the Canal Company, in inviting and permitting the Bay Port to enter the canal, continued in this case,— in which no overshadowing intervening negligence appears,— to the time the Bay Port was lost. Had she been salvaged by the wrecking company to a place and condition of safety then the changed situation might have rendered the original negligence inoperative ; but the Bay Port never was salvaged. She was, from the time of her first stranding, under the disability created at least in part by the Canal Company. Surely the latter cannot rely upon its own negligence as a defence.

From the moment the Bay Port entered the canal to the time of her loss, no element has entered the case to make inoperative the initial negligence of the Canal Company. The only ones suggested which could in any way affect the train of causation are : —

1. The remark of the Honorable Judge of the District Court that possibly too much helm was given the Bay Port

between the first shoal and the first stranding, which as before shown is not based upon any evidence in the case, is contrary to the affirmative evidence of all the navigators on the spot, opposes directly the affirmative pleading of the Canal Company; is doubted by the Honorable Judge of the District Court himself, who intimates that the first stranding may have been due to inevitable accident; and it was not accepted by the Circuit Court of Appeals.

2. The three suggestions of the Circuit Court of Appeals that after the Bay Port came afloat and before she reached the second shoal she should have been held by tugs in the canal, tied to dolphins and retrimmed. These are all hindsight suggestions, contrary to the views of all the expert navigators on the spot reached after deliberation at a conference called for the purpose, contrary to the direct order of the canal superintendent to his assistant to take the vessel out of the canal as soon as possible, and though considered by the Honorable Judge of the District Court, outside of the respondent's pleadings, were by him rejected.

If the petitioner White Oak Transportation Company, in engaging a reputable salvage company to save its vessel, and through its master, in having her officers and crew in readiness and steam up and in allowing the pilot of the canal and the apparent representative of the Canal Company to proceed with his vessel in accordance with the prearranged plan and the order of the canal superintendent, acted as was reasonable and prudent, and if Captain Hammett was not at fault for not taking command of his vessel away from the canal pilot in this difficult waterway of which he was ignorant and performing the acts suggested by the Circuit Court of Appeals, contrary to the order of the canal superintendent and rejected by the Honorable Judge of the District Court, then we submit the original fault of the Canal Company is at least a con-

tributing cause of the second stranding and loss of the Bay Port and her cargo.

The British Isles, 264 Fed. 318 and

The Vera, The Melrose, 224 Fed. 998.

New England Fuel & Trans. Co. v. City of Boston,
257 Fed. 778, 781.

In this latter case (Mass. Dist.), in which the steamer Currier collided with a drawbridge of the City of Boston turning the draw of the bridge against a tugboat of the libellant, Judge Morton, considering whether the delay of the drawtender in operating the draw made inoperative the negligence of the steamer in proceeding at immoderate speed, states:

“The fact that the course of the defendant’s negligence is so diverted by the act of a second person — even a negligent act — as to result in injury to the plaintiff, does not exonerate the defendant, if there was a continuing causal connection between what the defendant did and the injury. In *Eaton v. B. & L. R. R. Co.*, 11 Allen, 500 (Mass.) 87 Am. Dec. 730, the train of the defendant, in which the plaintiff was a passenger when injured, came to a stop between stations. There was a rear-end collision with a following train, operated by another railroad using the same tracks. The collision might have been avoided by due care in handling the overtaking train. The defendant was, however, held liable, on the ground that its negligence contributed to the accident.”

See also to the same effect the following common law cases:

Boston Woven Hose Co. v. Kendall, 178 Mass. 232,
236, 237.

Glynn v. Central R. R. Co., 175 Mass. 510, 511.

Clifford & Atlantic Cotton Mills, 146 Mass. 47 and 48.

Union Stockyards Co., etc. v. Chicago etc. R. R. Co., 196 U. S. 217, 228.

The opinions in the first three are by Mr. Justice Holmes; the opinion in the latter case by Mr. Justice Day. That the original negligence of the respondent operated as a contributing cause of the loss of the Bay Port and her cargo was clearly the opinion of Judge Anderson, who in his dissenting opinion on the petitioner Northern Coal Company's motion for amendment of the decree says :

"The fact that the Bay Port ran aground twice and that the second grounding might have been avoided if the captain had more accurately sensed the situation and been more careful does not seem to me to prevent the original negligence of the Canal Company from continuing an efficient and proximate cause of the loss of the cargo.

"This cargo was lost because both the owners of the Bay Port and the Canal Company ought to have known that it was unsafe to try to take it through that canal in that type of vessel. The fact that, after this dangerous enterprise had been negligently entered upon, the captain was guilty of an additional act of negligence does not seem to me to make that additional act of negligence the sole proximate cause of the loss of the cargo."

(Anderson, J., Opinion, Rec. pp. 573-574.)

IV. THE CIRCUIT COURT OF APPEALS ERRED IN NOT HOLDING THAT THE ACTS OF OMISSION OF THE MASTER OF THE BAY PORT AFTER HIS VESSEL CAME AFLOAT WERE IN EXTREMIS AND THE PETITIONER WHITE OAK TRANSPORTATION COMPANY IS NOT LIABLE THEREFOR.

The steamer Bay Port had grounded first at 2.15 P. M. She had been turned over to an experienced and competent wrecking company, which had promptly taken charge of the salvage operation through a skilled superintendent. This superintendent had engaged the services of three steam tugs and had had the company's wrecking lighter with salvage crew sent down from Boston. It was not anticipated by anyone that the vessel would float till near noon. At about 10.15 A. M., however, the vessel without warning relieved herself from her stranded position and floated off with the current. The situation and the manner in which it was met is stated by the District Court as follows:—

“The *sudden and unexpected* floating of the steamer and her being caught by the current in the narrow channel created a serious emergency. Captain Joseph Lewis, who was at the time on the lighter Salvor, alongside the Bay Port, called to pilot Lewis on the steamer's bridge, ‘she is yours’, or words to that effect,—to which pilot Lewis assented. From that time until after the accident, the Scott Company, as before stated, had nothing more to do with the steamer and exercised no control over her. Pilot Lewis assumed command of her. By his orders, one of the tugs (the Dalzelline) took a short hawser ahead; another pushed the steamer's stern straight with the canal and then took away the lighter; the third tug,

apparently without orders, swung out into the current, and started after the steamer with the idea of getting a line on her stern. The order was given to start the steamer's engines full speed ahead, in order to obtain steerageway. Meanwhile the Bay Port was drifting along the canal, going in this manner perhaps a third of a mile. Then by the action of her own engines and of the tug ahead she obtained steerageway through the water and took on a speed over the ground of about six miles per hour.

"Some dolphins where she might have been tied up were passed without any effort to place her there. Shortly afterward, the tug Hazelton came up behind the Bay Port and offered a line to her quarter. The men on the Bay Port were so much occupied that nobody took it." (*Italics ours.*)

(Morton, J., Opinion, Rec. pp. 24 and 25.)

The Circuit Court of Appeals, in describing the situation, states:—

"... *unexpectedly*, about 10.15 A.M. she slid off the bank into the channel of the canal. The tide was then running east at about three knots an hour. The pilot who upon the day before had undertaken to pilot her through the canal was not present, but another canal pilot, Captain William T. Lewis, was upon one of the tugboats, and when the Bay Port slid off the bank he jumped from the tug aboard the steamer and ran upon her bridge with her captain, of whom he inquired if he had steam up, and being told that he had, he directed him to start his engines full speed ahead to prevent her drifting upon the opposite bank.

"When she came off the bank into deeper water she was down at the head about eighteen inches, accord-

ing to Captain Hammett, and about thirty inches, according to Pilot Lewis, and had a list to port of about fifteen inches, according to the former, and about twenty-four inches according to the latter. The tide had then been flowing easterly in the canal since 6 A. M. and the Bay Port was caught by it and commenced to drift to the eastward. The three tugs with steam up were all hanging to the port side of the Bay Port, but were headed toward the west; and upon the same side about amidships was a small wrecking boat of the Scott Company. Pilot Lewis gave a command to one of the tugs to take the wrecking boat in charge, and to another to get a hawser upon the Bay Port's bow, which it did after it had turned about, and commenced to tow the Bay Port eastward." (*Italics ours.*)

(Circuit Court of Appeals Opinion, Rec. p. 549.)

The Circuit Court of Appeals, however, in searching for a cause of the second stranding, held that Captain Hammett should have taken command of his vessel away from the canal pilot, held her by tugs in the canal, tied her up to dolphins and retrimmed her.

Pilot Lewis is described by the Honorable Judge of the District Court as "a canal pilot of recognized ability" (Opinion, Rec. p. 23). His connection with the navigation of the Bay Port is described by the superintendent of the Canal Company as follows:—

"Q. 90. What instructions, if any, did you give to any of them as to what to do if she came off? A. To get her through the canal just as soon as possible.

Q. 91. To whom did you give that instruction? A. Pilot Lewis."

(Geer, Rec. p. 338.)

"Q. 106. When she came off the bank, with the

hole on her starboard side plugged up and her own pumps having control of her, pilot Lewis was on board? A. Yes, sir.

Q. 107. And the three tugboats were alongside? A. Yes, sir.

Q. 108. In that situation who had charge of the navigation of that ship through the canal?

Mr. PILLSBURY. I think that is purely a question of law.

Mr. PARK. It is a question of fact.

The COURT. I think he may state; yes.

Mr. PILLSBURY. Will your Honor save my exception?

The COURT. Yes, I will save your exception.

A. Just as soon as that ship left the bank, pilot Lewis was in full charge and would give the orders, whatever he saw fit; he had full charge of everything just as soon as she left the bank."

(Geer, Rec. pp. 339-340.)

In accordance with this duty he immediately upon the floating of the steamer took charge of her navigation, which was acquiesced in by Captain Hammett of the Bay Port.

All the officers and crew of the Bay Port were on board ready for duty and prompt in obeying the orders of the pilot and in performing everything possible for the protection of their ship (Hammett, Rec. p. 429, Q. 104-105; Rec. p. 431, Q. 159-163; Rec. p. 432, Q. 183-184; Hart, Rec. p. 414, Q. 73-81; Rec. p. 415, Q. 101-103; L. Maker, Rec. p. 488, Q. 93; Rochester, Rec. p. 262, X-Q. 95-96; Rec. p. 265, X-Q. 126; Lewis, Rec. p. 182, X-Q. 316-322).

Captain Hammett had had 27 years experience at sea, but held no license to navigate in the canal, he was unfamiliar with this waterway and had turned over the

navigation of the vessel to the canal pilot, who was using one of the canal tugs as an aid in the passage of the vessel through the canal; he remained passive in the handling of the ship except that he stood upon the bridge with the pilot interpreting to the engine room the bell signals. The petitioner submits that it would have been highly improper for Captain Hammett, when his ship had unexpectedly come afloat in this difficult waterway unfamiliar to him, to interfere with a man of so great experience and reputation (Morton, J., Opinion, Rec. p. 23) in the care of vessels in the canal as pilot Lewis. As the Honorable Judge of the court states:—

“ The Canal Company’s libel does not charge negligence in the management of the steamer while she was in the pilot’s charge after she came off the bank; and no such contention has been made by it. It is further argued by the Canal Company,—under what charge in the libel is not clear,—that Captain Hammett was at fault for not preventing Pilot Lewis from attempting to take the Bay Port through the canal after she floated. This question is not free from doubt. The day before, under much safer conditions both of current and of trim, the Bay Port had been unable to go through safely. It is evident that a great mistake was made in supposing that it was safe to renew the attempt under the conditions existing when she came off the bank. It is, however, to be remembered that the decision to go on was made *under the pressure of an unexpected emergency* (caused by the floating of the steamer so long before high water that the tide was still running at full strength), and that it followed out the plan of action which had received the assent of all parties in interest, including the Canal Company, although nobody foresaw the situation which actually presented itself. Captain Hammett

was unfamiliar with the canal. He had been through it only a few times, and never with a loaded vessel. He was not pilot for it, and had no intimate knowledge of the dangers which navigation there involved. He was without experience in handling vessels in the canal. *The question presented was not one of ordinary navigation, but of navigation under very uncommon conditions and with reference to a peculiar waterway. Pilot Lewis was in many ways better qualified than Captain Hammett to decide what to do.*" (Italics ours.)

(Morton, J., Opinion, Rec. p. 26.)

The attempt of Pilot Lewis to take the Bay Port through the canal was in accordance with instructions from the superintendent of the Canal Company, and was likewise in accordance with the opinion of the master of the Bay Port, salvor Lewis and pilot Lewis in consultation the evening of the first stranding. In addition there is no adverse criticism of Captain Hammett or Pilot Lewis in the pleadings or testimony. Failure to hold the Bay Port in the current of the canal by the use of tugs, tie her up to dolphins and retrim her cargo has not been considered improper by any party in the case, and was excused by the Honorable Judge of the District Court. The Circuit Court of Appeals, however, having relieved the Canal Company of responsibility for the second stranding, suggests these acts of omission as the proximate cause of the second stranding and loss of the steamer and cargo.

The contention of the petitioner White Oak Transportation Company is that a careful and prudent navigator, even considering deliberately the circumstances of this case, would have continued with the Bay Port through the canal after she came afloat, leaving the particular navigation of his vessel to an apparently competent canal pilot

and canal company salvage agent, and that even though errors were made by Captain Hammett of the Bay Port in not performing those acts the omission of which are charged against him by the Circuit Court of Appeals, they were made in extreme circumstances in which a careful and prudent navigator might well have failed, and being *in extremis* do not constitute a fault.

The Oregon, 158 U. S. 186.

The Queen Elizabeth, 122 Fed. 406.

The Chicago, 100 Fed. 999.

The Pacific, 154 Fed. 943.

The Queen City, 189 Fed. 653.

The Philadelphia, 199 Fed. 299.

The Cetus, 202 Fed. 189.

The Buckhurst, 6 P. D. 152.

In this latter case the vessel was under a duty to have exhibited her side lights. The circumstances, however, were that she had parted her anchors and had been driven over a sand bar in an unmanageable state owing to her rudder being disabled. The court held that the crew of the vessel would naturally be so engrossed in the effort to save her from becoming a wreck that in the hurry and confusion of the moment failure to comply with the regulations was excusable.

The Queen Elizabeth, *supra*, is a case of a collision of crossing vessels, and the court, exonerating the master of the vessel, says:—

“ When the master of a vessel is confronted with a sudden peril, caused by the action of another vessel so that he is justified in believing that collision is inevitable and he exercises his best judgment in the emergency, his action, even though unwise, cannot be regarded as a fault. ‘ The judgment of a competent sailor *in extremis* cannot be impugned.’ *The Oregon*,

158 U.S. 186, 204, 15 Sup. Ct. 804, 29 L. Ed. 943. It is the duty of the court as far as possible, to place itself in the position of the master and to endeavor to interpret the rules of navigation in the light of the perils and perplexities which surrounded him at the time — the impending danger, the excitement of the moment, the necessity for immediate action. Where a navigator of experience and good judgment acts in such circumstances, his action, if within the limits of reasonable judgment and discretion, cannot be imputed to his vessel as a fault.

"If he acts upon his best judgment at the time it is sufficient, even though subsequent judicial investigation may show that he might have chosen a more prudent course. A master who the next moment may be sinking with his ship and crew cannot be expected to display the utmost coolness and deliberation. *The Dimock*, 23 C. C. A. 123, 77 Fed. 226; *The City of Augusta*, 25 C. C. A. 430, 80 Fed. 297; *The Iron Chief*, 11 C. C. A. 196, 63 Fed. 289; *The Havana* (D. C.) 54 Fed. 411; *The Robert Healey* (D. C.) 51 Fed. 462."

Without question, when the Bay Port came afloat, Captain Hammett was confronted by an emergency, a complex situation involving peril. It was no time for cool and deliberate meditation. Captain Hammett was on deck near No. 3 or No. 4 hatch when he noticed his vessel afloat (Hammett, Rec. p. 431, Q. 143 and 151). He climbed at once to the bridge where he found that pilot Lewis had preceded him (Hammett, Rec. p. 431, Q. 157). The lighter Salvor, attached to the port side of the Bay Port, needed attention, and one of the tugs heading to the westward took hold of her. Another tug also heading to the westward cast off her lines in order to get into a posi-

tion to manoeuvre, and the third tug started at once to get out a line from the bow of the Bay Port in order to tow the latter on a hawser ahead.

The Bay Port "as soon as she left the bank was seized by the current and swept along at a speed of three to four miles per hour" (Morton, J., Opinion, Rec. p. 23), and Captain Hammett under orders of Captain William Lewis had rung up full speed ahead (Hammett, Rec. p. 445; X-Q. 383-384). Taking an average of four knots over the bottom, the Bay Port would pass the dolphins, which were 1,000 feet from the place the Bay Port had lain aground (Circuit Court of Appeals Opinion, Rec. p. 553), within three minutes.

Surely it must have taken three minutes for the navigators of the Bay Port to adapt themselves to the new situation and attend to the above things without dealing with the further questions suggested by the learned Circuit Court of Appeals, to wit: Whether tugs could hold the Bay Port in the canal; what tugs were available for this purpose; whether it was advisable to navigate his logy vessel to the dolphins on the northern edge of the channel — of the existence of which dolphins he had no knowledge — (Morton, J., Opinion, Rec. p. 27) — the execution of which would require the withdrawal of the tug ahead on a hawser to a position alongside of the barge; whether there were facilities for retrimming the vessel and, the more serious question which would require from Captain Hammett careful thought, whether he being ignorant of the condition in the canal should take away command of his vessel from the canal pilot.

To perform all the acts necessary to getting his vessel under way, to determine all the above questions and to execute the manoeuvres determined upon, — all without error within the space of three minutes would be, in the

peril and excitement surrounding this case, to hold Captain Hammett to the degree of care of a superman.

The failures to perform the acts suggested by the Circuit Court of Appeals, if errors at all, are errors of judgment *in extremis* for which the petitioner White Oak Transportation Company should not be held at fault.

V. THE CIRCUIT COURT OF APPEALS ERRED IN NOT HOLDING THAT THE RESPONDENT HAS NOT SUSTAINED THE BURDEN OF PROVING THAT THE STRANDINGS COULD NOT HAVE BEEN CAUSED BY THE SHOAL SPOTS.

The petitioner requested both courts in its arguments and briefs to apply the rule on burden of proof as expressed in

The Pennsylvania, 19 Wall. 125,

and hold that there was upon the respondent the duty to prove that the two shoals not only did not but *could not* have caused or contributed to the strandings; both courts have ignored this principle.

This rule has been approved by this Court recently in the case of

Lie v. San Francisco & Portland SS. Co., 243 U. S. 291,

and has been followed in the lower courts,—

The Thielbek, 241 Fed. 209, 216,

The Ellis, 152 Fed. 891,

The Dauntless, 121 Fed. 420,

wherever there has been a positive breach of a statutory duty. This rule is applicable to the circumstances of the present case, and yet both the District Court and the Circuit Court of Appeals failed to follow and apply it. If applied, a presumption of negligence against the respond-

ent would arise which the facts of the case cannot overthrow.

The Act under which the Canal Company was incorporated (Massachusetts Acts of 1899, Chap. 488, § 3) prescribed that "said canal when constructed shall have a depth of not less than 25 feet at mean low water". At the time of the strandings the canal had been constructed and was open to navigation, and also, as before stated, the respondent had made advertisement, which had been brought to the attention of the master of the Bay Port, that the canal at this time contained in its navigable channel 25 feet of water at mean low water (Petitioner's Exhibit 11, p. 3).

As a matter of fact the requirement of the statute was not complied with, and the published statement was untrue and known to be so by the respondent (Petitioner's Exhibit 1, Rec. p. 244; Petitioner's Exhibit 3, Rec. p. 247; Petitioner's Exhibit 4, Rec. p. 249; Rec. pp. 277-278, 340; Geer, Rec. p. 525, X-Q. 342). This was admitted by the respondent in open court (Rec. pp. 340-341).

A. The First Shoal.

Instead of the 25 feet mean low water depth required by the Statute there were at the time of the entrance of the Bay Port into the canal over the first shoal spot 19½ feet mean low water (Morton, J., Opinion, Rec. p. 22; Circuit Court of Appeals Opinion, Rec. p. 551). Its character and size were ascertained by the Canal Company twenty-three days prior to the date of the stranding of the Bay Port by soundings made by its engineering department (Petitioner's Exhibit 1, Rec. p. 244), and the extent of the shoal can be seen from the excavation which was made shortly after the stranding by the dredge Kennebec, which took out from this point in the canal 1,350 square yards of dredged material (Rec. p. 455). Not only

did the Canal Company have definite knowledge that the shoal existed and that the water was $5\frac{3}{4}$ feet less than the statute required and its advertisement stated, but it did not notify the shipping fraternity nor even the canal pilots or towboat masters of the existence of this shoal (Petitioner's Int. 68 and Ans. Rec. pp. 61, 71; Crocker, Rec. p. 243, X-Q. 134-136; Wagner, Rec. p. 231, X-Q. 82-87; Smith, Rec. pp. 234-235, X-Q. 44-48; McGilvray, Rec. pp. 225-226, X-Q. 28-31).

The respondent is, by reason of this violation of the Statute, under a duty to prove that the first shoal *could not* have contributed to the first stranding.

The rise and fall of the tide at this point is 4 to $4\frac{1}{2}$ feet (Coakley, Rec. p. 253, X-Q. 210-211; Dunbar, Rec. p. 276, Q. 82; Petitioner's Int. 78, Rec. p. 62, and Ans. Rec. p. 72); at the time the Bay Port was passing through the canal it was half tide (Morton, J., Opinion, Rec. p. 20; Circuit Court of Appeals Opinion, Rec. p. 549), and there was at the time the Bay Port was passing over this shoal from 21 to 22 feet of water (Morton, J., Opinion, Rec. p. 22; Circuit Court of Appeals Opinion, Rec. p. 551). The Bay Port drew 18 feet 2 inches aft and 17 feet 8 inches forward (Morton, J., Opinion, Rec. p. 22; Circuit Court of Appeals Opinion, Rec. p. 548).

It was necessary as before set forth in section III of this brief that the Bay Port should have, in order not to "smell the bottom" in this narrow waterway in which courses a swift tidal current together with cross-currents and eddies, a clearance on the bottom of at least five feet, and this is admitted by the Canal Company to be safe clearance for vessels passing through the canal; for in its advertisement, while it places a maximum depth at mean low water of 25 feet, it limits the maximum depth of the vessels entering the canal at 20 feet (Coakley, Rec. p. 300, X-Q. 197-201; Petitioner's Ints. 6-9 and Ans. Rec. pp. 57,

68-69). Instead of the necessary 5 foot clearance, the Bay Port had a clearance according to the findings of both courts of from 2 feet 10 inches to 3 feet 10 inches.

The Bay Port, which was 265 feet in length (Morton, J., Opinion, Rec. p. 20; Circuit Court of Appeals Opinion, Rec. p. 548), proceeding through the water about six knots against a head current of three knots (Morton, J., Opinion, Rec. p. 20; Circuit Court of Appeals Opinion, Rec. p. 549), struck the bank of the canal about 1,000 feet from where this shoal terminated (Morton, J., Opinion, Rec. p. 22; Circuit Court of Appeals Opinion, Rec. p. 551), *i. e.*, less than three of her lengths after her stern had left the shoal. Before reaching this shoal spot, no difficulty had been encountered in connection with her steering (Morton, J., Opinion, Rec. p. 21).

After passing this shoal and before striking the bank, the Bay Port, which at the time she passed over the shoal was in the centre of the channel (L. Maker, Rec. p. 494, Q. 181-183), showed by the hawser of the tug that the suction of the shoal was affecting her (Lecompte, Rec. p. 199, X-Q. 145-146). She then took a slight sheer toward the north bank (Morton, J., Opinion, Rec. p. 21), which was broken, and seemed to hang to the north bank of the canal (L. Maker, Rec. p. 484, Q. 23; Morton, J., Opinion, Rec. p. 21). She then, meeting the current sent off from the knuckle (Morton, J., Opinion, Rec. p. 22), took a sudden sheer to starboard, which was broken, but not in sufficient time to prevent her grounding while nearly parallel with the southern bank and about one and one-half lengths from where this latter sheer started (Morton, J., Opinion, Rec. p. 21).

Captain Rochester, the canal pilot in charge of the Bay Port, used every effort to break this starboard sheer by the use of her helm, instructions to the tug ahead to pull the steamer's bow against the sheer, and putting the

engines of the steamer full speed astern (Rochester, Rec. pp. 263-264, X-Q. 110-111), without success.

All the witnesses who were asked the question testified that if there were 25 feet of water under the Bay Port she ought to have navigated the canal safely (Wagner, Rec. p. 231, X-Q. 87-90; Lewis, Rec. p. 179, X-Q. 284; See Scott, Rec. p. 318, X-Q. 214-215; Shelton, Rec. p. 465, Q. 135; Hammett, Rec. pp. 432-433, Q. 185-187), and all those on the Bay Port who testified believed that she sheered by reason of meeting shoal ground (Rochester, Rec. p. 265, X-Q. 118; Hammett, Rec. p. 428, Q. 98-99; Shelton, Rec. p. 465, Q. 133; Rec. p. 472, X-Q. 255; L. Maker, Rec. p. 485, Q. 36). This was also the opinion of Captain Lecompte of the tug (Lecompte, Rec. p. 200, X-Q. 157-158).

The Honorable Judge of the District Court has suggested that too much helm was given to the Bay Port while she was clinging to the northern bank (Morton, J., Opinion, Rec. p. 22). *Yet no navigator has so testified; no such contention has been made in the pleadings or allegations of fault; there has been no evidence whatever in the case upon which such a finding can be based; in fact the Canal Company affirmatively pleaded that the vessel had become unmanageable, and all proper steps were taken to check the sheers and enable her to recover her course on the occasions of both strandings.* (Libel of respondent v. petitioner, Rec. pp. 34 and 35; Answer of respondent to libel of petitioner, Rec. pp. 88-89.) The Honorable Judge of the District Court apparently did not place much weight upon this suggestion, for his formal finding as to the cause of the first stranding is that it was "due either to pure accident or to faulty navigation by the pilot" (Morton, J., Opinion, Rec. p. 23). The Court of Appeals did not accept either suggestion of the District Court.

The petitioner White Oak Transportation Company

respectfully submits that it was the natural and probable result of the first shoal spot that the Bay Port would "smell bottom" in passing over the shoal and would sheer and strike the bank within three of her lengths after her stern had left this shoal. The said petitioner further suggests that the act of the pilot suggested by the Honorable Judge of the District Court — of which there is no evidence in the case — even if an error of navigation, does not render inoperative the fault of the Canal Company in allowing the shoal spot to exist. *Certainly it cannot be held, under*

The Pennsylvania, supra,

that this shoal spot could not have caused the first stranding.

B. The Second Shoal.

The same situation holds in connection with the second shoal. This shoal had been known to the Canal Company as early as June 13, 1916, and was sounded and plotted on its charts (Petitioner's Exhibit 3, Rec. p. 247). This plan shows between stations 193 and 192 a depth of 20 feet; between stations 194 and 193 a depth of 18.2 feet. Soundings were again taken on August 17, 1916, and plotted upon this same plan. Between June 13 and August 17 the shoal had enlarged (see also Crocker, Rec. pp. 246-247, X-Q. 165-167). A further survey was made on November 18, 1916, less than a month prior to the entrance of the Bay Port into the canal (Petitioner's Exhibit 4, Rec. p. 249), which indicates a further growth of the shoal to the eastward beyond station 191; and between stations 193 and 192 *the depth is 18.2 feet for a considerable distance on the centre line of the canal.* The presumption is that this shoal had further grown in the month preceding the grounding of the Bay Port.

It is not surprising that in the maze of soundings upon

the plans the Honorable Judge of the District Court did not note the 18.2 foot marks. His finding was 20 feet mean low water (Morton, J., Opinion, Rec. p. 25), and the Circuit Court of Appeals apparently endorsed this without examination of the plans (Circuit Court of Appeals Opinion, Rec. p. 551).

The existence of these shoals was denied on oath by the Canal Company until it was compelled by order of the court to produce its plans (Ans. to Petitioner's Ints. 58 and 66, Rec. pp. 61 and 71; Interlocutory Opinion, Rec. p. 76), but knowledge of this shoal spot prior to the entrance of the Bay Port was admitted by the superintendent of the canal (Geer, Rec. p. 525, X-Q. 342), by its engineer (Crocker, Rec. p. 242, X-Q. 108-109; p. 243, X-Q. 130-134; p. 254, X-Q. 228), and in open court by proctor for the Canal Company (Rec. pp. 277 and 340); yet the Canal Company previous to the entrance of the Bay Port into the canal gave no notification to the owners or operators of vessels using the canal or even to the canal pilot and canal tow-boat masters of the existence of the second or of the first shoal (Petitioner's Int. 68 and Ans. pp. 61 and 71; Crocker, Rec. p. 243, X-Q. 134-136; Wagner, Rec. p. 231, X-Q. 82-87; Smith, Rec. pp. 234-235, X-Q. 44-48; McGilvray, Rec. p. 225, X-Q. 28-31).

The findings of both lower courts were that there were five feet of water at mean low water less over this second shoal than the statute of incorporation of the Canal Company required or its advertisements stated; in fact, the plans of the Canal Company indicated 6.8 feet less than the required depth; and the question rises whether the Canal Company has sustained the burden under

The Pennsylvania, supra,

to prove that the second shoal *could not* have caused the second stranding.

It was about half tide at the time of the second stranding, though the current was running to the eastward in the opposite direction from that of the previous day (Morton, J., Opinion, Rec. p. 23; Circuit Court of Appeals Opinion, Rec. p. 549). There was, therefore, over this shoal, adding 2.5 feet for the rise at half tide, 20.7 feet of water at the time the Bay Port passed over it. The findings of the lower courts, based upon a mean low water depth of 20 feet, is that there were 23 feet of water. It is difficult to understand why the Honorable Judge of the District Court added three feet on a half tide (Morton, J., Opinion, Rec. p. 25) when the total rise of the tide is only four to four and a half feet (Crocker, Rec. p. 253, X-Q. 210-211; Dunton, Rec. p. 276, Q. 82; Petitioner's Int. 78, p. 62, and Ans. Rec. p. 72; Morton, J., Opinion, Rec. p. 22), especially when his reckoning on half tide in connection with the first shoal added $1\frac{3}{4}$ to $2\frac{3}{4}$ feet.

The Bay Port when she came off from her first position was down by the bow about 18 inches more than her previous bow draft of 17 feet 8 inches (Morton, J., Opinion, Rec. p. 23; Circuit Court of Appeals Opinion, Rec. p. 550), and with a list of about 15 inches to port (Morton, J., Opinion, Rec. p. 23; Circuit Court of Appeals Opinion, Rec. p. 550), due to her cargo being wet and having more or less water in her hold forward. This accounts for her being logy and somewhat harder to handle, as was testified to (Scott, Rec. p. 317, X-Q. 203-205; B. Kemp, Rec. p. 391, X-Q. 39). Her draft was therefore approximately 19 feet 2 inches. There was therefore a clearance of 1.5 feet, according to the plans of the Canal Company, or 3.8 feet, according to the findings of the lower courts, both of which are well under the clearance of five feet, which, as heretofore shown, was necessary.

Using her own propeller and aided by a tug, she took on headway through the water, and proceeded without

appreciable difficulty for about a mile (Circuit Court of Appeals Opinion, Rec. p. 551) until she had passed over the second of the only two shoal spots in the canal. Then she sheered slightly to starboard, narrowly missing the lighter Trilby which was at work in the canal. This sheer was broken by aid of the tug, and the steamer's helm (Morton, J., Opinion, Rec. p. 25). She then sheered abruptly to the port bank and struck about 2,000 feet east of this second shoal (Morton, J., Opinion, Rec. p. 25; Circuit Court of Appeals Opinion, Rec. p. 551).

The fact that the steamer stranded twice the distance from this second shoal that it did from the first shoal is corroborative proof that the shoals caused both strandings. In the second case the Bay Port was proceeding through the water with a three-knot current, and in the first instance against a three-knot current, and on the first occasion was making over the bottom 3 knots per hour (Morton, J., Opinion, Rec. p. 20; Circuit Court of Appeals Opinion, Rec. p. 549), and on the second occasion 6 knots per hour (Morton, J., Opinion, Rec. p. 25). It is but natural to suppose that she would, after becoming unmanageable, proceed on the second occasion twice as far before striking the bank. It is a singular coincidence that the Bay Port should sheer into the bank a short distance after passing the only two shoal spots in the canal.

All the navigators who testified upon the point stated that the Bay Port sheered because of running into shoal water. Hart, the second officer of the Bay Port, testified as follows:—

“ Q. 98. Can you give us any reason why your vessel sheered at that time? A. Well, I don't know the reason; no, sir; but I can give you my opinion.

Q. 99. Well, what is your opinion as to why she sheered?

Mr. PILLSBURY. I don't think he can do that.

The COURT. Yes, he may answer.

A. Well, I should say, it being a narrow channel — the canal, — and the ship drawing the depth of water she did, and being near the bottom, caused her to sheer."

(Hart, Rec. p. 415.)

And again: —

"X-Q. 128. Perhaps I did not make myself clear. Mr. Blodgett asked you what your opinion was as to the cause of that sheer that she took the second day? A. Yes, sir.

X-Q. 129. Do you remember that? A. Yes.

X-Q. 130. Now, in answering that question did you assume that the water was shallow at that point that she took that sheer? A. He asked me my opinion, and I told him I thought on account of being shallow water she took the sheer; yes, sir.

X-Q. 131. If, as a matter of fact, it was not shallow water where she took the sheer, what would be your opinion as to the cause of the sheer? A. I don't understand you. You mean if there is plenty of water under the ship?

X-Q. 132. Yes. A. She wouldn't have took the sheer."

(Hart, Rec. pp. 417-418.)

Shelton, the first officer, says: —

"Q. 134. And in your judgment, what caused her to sheer on the second day? A. Shoal water.

Q. 135. If there had been 25 feet mean depth of water, in your judgment would either accident have happened? A. I don't think so."

(Shelton, Rec. p. 465.)

And again : —

"X-Q. 191. You said in answer to Mr. Blodgett that you thought the cause of her sheering both the first day and the second day, and all the sheers that she took was shoal water? A. It seems that way, sir, the way the ship took the sheer.

X-Q. 192. You do not know of your own knowledge that there was shoal water there, do you? A. No, sir; I couldn't say; I didn't sound it.

X-Q. 193. Now, let me assume, Mr. Shelton, simply for the sake of argument, that there was no shoal water when she sheered, that she had plenty of water underneath her; what would you say was the cause of the sheer? A. I should say she never would have sheered, sir, if there was not shoal water.

X-Q. 194. You cannot conceive of her sheering for any other reason? A. No other reason, unless there is shoal water or current; I couldn't say which."

(Shelton, Rec. pp. 468-469.)

The testimony of the helmsman was : —

"Q. 92. Could you see anything that caused your vessel to sheer on this second day? A. I couldn't see anything, sir, but imagined it was shoal water or something of that kind."

(L. Maker, Rec. p. 488.)

Captain Hammett of the Bay Port is of the same opinion : —

"Q. 181. And then her stern came out and she sank? A. Swung against the south bank and sunk.

Q. 182. What, in your opinion, was the reason for her sheering to starboard and port, towards the south bank and north bank on that occasion?

Mr. PILLSBURY. The same objection that I made to the other.

A. Shoal water ; that is the only thing that I could tell."

(Hammett, Rec. p. 432.)

Thus all the officers of the Bay Port, who are more competent to testify on this point than persons off the ship,

The Natchez, 78 Fed. 183 ;

Towboat No. 1, 74 Fed. 906 ;

The Sam Sloan, 65 Fed. 125 ;

unite in the belief that shoal water was the cause of this sheering.

Professor Reeve testified from the point of view of a hydraulic engineer : —

"Q. 47. And have you examined the shoal spots further down? A. I have examined the soundings.

Q. 48. Have you examined the soundings? A. Yes, sir.

Q. 49. And if the shoal spot at 241 to 243 was sufficient to cause such an effect, the other would be at least as bad, wouldn't it? A. Yes; the situations are about equal. The second shoal spot is more shoal than the first, but is somewhat wider. On the other hand, it was also somewhat restricted by the barge Trilby. The situation was also accentuated the second day by the greater draft of the ship, being down by the head."

(Reeve, Rec. p. 501.)

An illustration of the theory that the Bay Port in passing over the second shoal was thrown in unstable equilibrium is the testimony of the first officer of the Bay Port as follows : —

"X-Q. 277. Now, Mr. Shelton, I will direct your attention to the second day. You stated in the log, in giving the account of the accident the second day, that the ship would not answer her helm, did you not? A. Yes, sir.

X-Q. 278. Is that a fact? A. Yes, sir.

X-Q. 279. Now, at what point was she when she would not answer her helm, in relation to where she struck? A. Well, I should say from the ferry until the time she struck,—until they broke that sheer to the south and started for the north shore.

X-Q. 280. Through all that period she would not answer her helm? A. No, sir.

X-Q. 281. If there were deep water in any of that portion of the canal where she would not answer her helm, how do you account for her not answering her helm? A. The only way I can account is shoal water; she won't answer —

X-Q. 282. But you don't know there was shoal water? A. No.

X-Q. 283. I say, assuming there was not any shoal water, or assuming there was deep water in certain portions of it, how do you account for her not answering her helm in deep water? A. *I don't think she had room enough, sir, after she got out of shoal water, to answer her helm.*

X-Q. 284. Did she answer her helm at any point in that time there? A. No, sir; not from then."

(Shelton, Rec. p. 474.)

There is no contention in the case that there was any fault of navigation from the time the Bay Port passed over this second shoal until she struck the bank.

The petitioner therefore respectfully submits that this second shoal which existed in clear violation of the statute

under which the Canal Company was incorporated was a proximate cause of the second stranding.

Certainly upon the evidence in the case it cannot be said that the second shoal spot could not have caused the second stranding.

VI. EVEN IF THE CIRCUIT COURT OF APPEALS WERE RIGHT IN HOLDING THE PETITIONER WHITE OAK TRANSPORTATION COMPANY AS WELL AS THE RESPONDENT AT FAULT, IT ERRED IN NOT DIVIDING DAMAGES.

The Circuit Court of Appeals, after reciting the published statement by the respondent that there were 25 feet of water in its canal, the inaccuracy of this statement, the solicitation it made to have vessels of the type of the Bay Port pass loaded through its canal, and the permission which it gave to the Bay Port to pass through the canal upon this occasion upon payment of tolls, states : —

“ Her peculiar structure and draft must have been as well known to the superintendent of the canal as to the captain of the vessel, for he testified that he saw her as she entered the canal, and the pilot who went out to her asked her captain her draft and was informed what she drew both forward and aft and must have reported to the superintendent what he was told, as the superintendent was to pass upon her admission to the canal, and she could not enter the canal without his permission.”

(Rec. p. 552.)

And again :

“ While we think the Bay Port was negligent in attempting to go through the canal, yet we also think the Canal Company was equally negligent in allowing her to enter it and that the hazard of her attempted

passage was assumed by the Canal Company with full knowledge of the risk. Mr. Geer, its superintendent, testified that he had remonstrated with the officers of the canal against the admission of vessels of her type, but that he had been overruled by them."

(Rec. p. 551.)

The court repeated this finding as follows: —

"While we think the Bay Port was negligent in attempting to use the canal in her deeply laden condition, we think the Canal Company was equally at fault in allowing her to use it, *and that neither should recover for any damage which may have been suffered by reason of her attempt to go through in the condition in which she was when she entered it*, no negligence being alleged in her navigation by the pilot or the tugboat or members of her own crew." (Italics ours.)

(Rec. p. 552.)

Yet the Circuit Court of Appeals, on its findings, decreed in accordance with the principles of the common law that neither the petitioner nor the respondent nor even the cargo owner could recover damages in these actions.

It is manifest upon the facts stated and the opinion and decree of the Circuit Court of Appeals that the petitioner has suffered by reason of the adoption of a rule inconsistent with well established admiralty practice.

These proceedings were instituted and prosecuted in a court of admiralty in which it is a well-settled practice that in cases where both parties are at fault the total damages are divided equally between them; and the common law rule that neither can recover where both are at fault, which the Circuit Court of Appeals has applied, has no application.

The half damage rule may be traced at least as far back as

The Laws of Oleron,

Article 14 of which provides :

“ If a vessel being moar'd lying at Anchor, be struck or grappled with another vessel under sail that is not very well steer'd, whereby the vessel at anchor is prejudiced, as also wines, or other merchandize, in each of the said ships damnify'd. In this case the whole damage shall be common, and be equally divided and appriz'd half by half. . . .”

Article 27 of the

Laws of Wisbuy

apportions the loss as between the two ships in cases of accident.

In the

Ordonnance of Louis XIV

this rule was extended to cases of fault. Title 7, Sections X and XI provide :—

“ X. In case of ships running aboard each other, the damage shall be equally sustained by those that have suffered and done it, whether during the course, in a road, or in a harbour.

“ XI. But if the damage be occasioned by either of the masters, it shall be repaired by him.”

In its application to modern times the half damage rule has been narrowed to cases of mutual fault, and has been for a long period in sharp distinction to the common law practice. This distinction between the two forums is summarized in —

Cayzer v. Carron Co., 9 App. Cas. 873 :

“ The rule of common law says, ‘ as each occasioned

the accident, neither shall recover at all, and it shall be just like an inevitable accident; the loss shall lie where it falls.' Admiralty says, on the contrary, 'if both contributed to the loss, it shall be brought into hotchpotch, and divided between the two.'"

This doctrine was first adopted in the United States of America in the case of

The Catherine, 17 How. 170,

and has been followed in numerous subsequent cases, in all of which the Supreme Court treats the law on the subject as settled.

The John Fraser, 21 How. 184.

The Union SS. Co. v. N. Y. & Va. SS. Co., 24 How. 307.

The Washington and The Gregory, 9 Wall. 513.

The Sapphire, 11 Wall. 164.

The Maria Martin, 12 Wall. 31.

The Alabama and The Gamecock, 92 U. S. 695.

The Atlas, 93 U. S. 302.

The North Star, 106 U. S. 17.

The Manitoba, 122 U. S. 97.

Belden v. Chase, 150 U. S. 674.

The Eugene F. Moran, 212 U. S. 466.

The expression of this rule in

Union SS. Co. v. N. Y. & Va. SS. Co., *supra*,
is:—

"Clearly if both were in fault then the damage must be equally apportioned between them."

In

The North Star, *supra*,

which was a case of collision, the court stated the rule as follows:—

“Where both vessels are in fault they must bear the damage in equal parts, the one suffering least being decreed to pay to the other the amount necessary to make them equal, which amount of course is one-half of the difference between the respective losses sustained.”

And in

Belden v. Chase, supra,

the distinction between the admiralty and common law is stated again as follows:—

“The doctrine in admiralty of an equal division of damages in the case of a collision between two vessels when both are in fault contributing to the collision has long prevailed in England and in this country (*The Max Morris*, 137 U. S. 1). But at common law the general rule is that if both vessels are culpable in respect of faults operating directly and immediately to produce the collision, neither can recover damages for injuries so caused (*Atlee v. Packet Co.*, 21 Wall. 389)”;

and the practice has been treated as settled in all the principal text books on the subject. See

1 Pardessus Collections de Lois Maritime, 334.

Cleirac U. S. et Coutume de la mer, 55.

1 Peters Admiralty Decisions, App. XXIII.

Hopkins on Average, 189.

Abbott on Shipping, Part III, Chap. 1, § 2.

Maclachlin on Merchant Shipping, 274.

Hughes on Admiralty, 276, 277.

Benedict on Admiralty, § 471.

One exception only to this general rule occurs, and that

is in personal injury cases where not only is the libellant not precluded from recovery by his own contributory negligence, but the amount of the recovery is left to the sound discretion of the court unqualified by the half damage rule.

The Max Morris, 137 U. S. 1.

The Daylesford, 30 Fed. 633.

Robinson v. Navigation Co., 73 Fed. 883.

Hughes on Admiralty, pp. 192, 208.

Even in these cases, however, the application of the half damage rule to other types of cases is recognized and distinguished.

The question of the right of the court to make discretionary division of the damages came up in the United States Supreme Court in the case of

The Victory, 63 Fed. 631, 68 Fed. 395, 168 U. S. 410,

which was a collision between two English ships in Norfolk harbor in which the District Court decided the Victory alone at fault. On appeal the Circuit Court of Appeals reversed the decision of the District Court, held both at fault but the fault of the Victory to be the more flagrant of the two, and it apportioned the loss by making the owners of the Victory pay the full value of their loss and the owners of the Plymothian merely pay the deficit sufficient to satisfy the cargo owners in full. Certiorari was applied for and obtained, and the case argued in the Supreme Court, but that tribunal held the Victory alone at fault, and the question of the proper method of apportioning the damage was not determined.

In the present case the bottom of the vessel of the petitioner White Oak Transportation Company was punctured in the first stranding and her hold filled with water. Damages have not been assessed, but they are appreciable,

and though the Circuit Court of Appeals has held that they were caused by the combined fault of the petitioner White Oak Transportation Company and the respondent, yet that court holds that no part of the damage is recoverable from the respondent.

The petitioner White Oak Transportation Company contends that the negligence of the Canal Company operated beyond the first stranding as an effective and proximate cause of the loss of the Bay Port and her cargo, and that even if both said petitioner and the respondent are held at fault the half damage rule should apply.

In failing to apply this half-damage rule, the Circuit Court of Appeals ignored a well-settled elementary principle of admiralty jurisprudence, to the detriment of the petitioner.

CONCLUSION.

The petitioner White Oak Transportation Company therefore respectfully submits that the decree of the Circuit Court of Appeals should be reversed with costs ; and that it should be allowed to recover its damages in full.

Respectfully submitted,

EDWARD E. BLODGETT,
FOYE M. MURPHY,

Proctors for Petitioner

WHITE OAK TRANSPORTATION COMPANY.

INDEX TO BRIEF.

	PAGE
I. State of facts	2 et seq.
II. No charge of fault made against The T. A. Scott Com- pany except by the Canal Company	6
III. Only one witness produced by the Canal Company to sup- port charges of fault against The T. A. Scott Company ..	8
IV. Steam tug WAUTAUPPA turned over in the canal ...	10
V. Holding the BAYPORT against the bank would probably have resulted in another puncture.	11
VI. There were many boulders upon the starboard side of the BAYPORT	13
VII. Inadvisable to hold the BAY- PORT against the bank	15
VIII. The T. A. Scott Company not allowed to assume the control of regular vessels in the canal	16

- IX. The passage of vessels through the canal was under the control of the Canal Company.. 18
- X. The tug boats were heading in the right direction when the BAYPORT came off the bank 18 et seq
- XI. Pilot William Lewis assumed charge of the BAYPORT when she slid off the bank 19
- XII. Pilot William Lewis was instructed to get the BAYPORT out of the canal 23
- XIII. The contract between the owner of the BAYPORT and The T. A. Scott Company was a salvage contract 29
- XIV. The Canal Company was authorized by its charter to maintain and operate steamtugs for assisting steamtugs through the canal 31

TABLE OF AUTHORITIES.

	PAGE
The Excelsior, 123 U. S. p. 40	30
Great Lakes Towing Company v. St. Joseph-Chicago Steamship Company, 253 Fed. Rep., page 635	30
Infanta Maria Teresa, 188 U. S. at p. 289 ..	30
Queen of Pacific, 21 Fed. Rep. p. 470	30
S. C. Schenk, 158 Fed. Rep. p. 54 and 63 ..	30



Supreme Court of the United States

October Term, 1918.

No. 1397.

BOSTON, CAPE COD & NEW YORK CANAL COMPANY,
Libellant-Appellant,

v.

THE T. A. SCOTT COMPANY, INC.,
Respondent-Appellee.

No. 1398.

BOSTON, CAPE COD & NEW YORK CANAL COMPANY,
Libellant-Appellant,

v.

WHITE OAK TRANSPORTATION COMPANY.

No. 1399.

WHITE OAK TRANSPORTATION COMPANY, *et al.*,
Appellants,

v.

BOSTON, CAPE COD & NEW YORK CANAL COMPANY,
et al.,
Appellees.

**BRIEF FOR THE T. A. SCOTT CO.,
Inc.**

STATEMENT OF FACT.

About 2 P. M. December 13th, 1916, the steamship "Bayport," laden with coal, and in charge of a canal pilot, and in tow of a steamtug exclusively engaged in the towage of vessels in the canal, became stranded in the canal at a place known as the Grave Yard between Wings Neck and Sandwich.

Rec. p. 337, Q. 82.

The steamship was on her way from Newport News, Va., to Weymouth, Mass. The starboard

side of the steamship was fast upon the rip rap forming the bank upon the starboard side of the channel.

Rec. Geer p. 338, Q. 84.

On the same afternoon at about high water three steamtugs employed in the canal attempted to remove the Bayport from the bank on which she was stranded without success. Immediately thereafter the agents of the Bayport at Boston were notified by telephone of the disaster, and about 3:30 P. M. Mr. Freeman, of the firm of Crowell & Thurlow, operating agents of the Bayport, requested Captain Joseph Lewis, who was the wrecking master at Boston for the T. A. Scott Company, Inc., to take, if possible, the 4:30 train from Boston for Buzzard's Bay, stating the steamship Bayport was in trouble in the canal. Captain Lewis replied that he would leave on that train. There was no further conversation relative to the engagement of the respondent.

Rec., Lewis, p.14, answer to Interrogatory Sixth.

The T. A. Scott Company, Inc., were and had been for many years engaged in salvage operations upon the Atlantic Coast and maintained a plant at Boston. Captain Joseph Lewis was recognized by persons connected with maritime

persuits at Boston, and adjacent maritime ports, as a person of large experience in salvage operations, resourceful and skillful.

Rec. Tooker p. 377, Q. 12-14, Robbins, p. 385, Q. 14.

The small lighter Salvor, with some wrecking paraphernalia, was dispatched from Boston that evening for the canal in tow of a steamtug. Captain Joseph Lewis arrived at the canal during the evening and early on the following morning with the aid of a diver, discovered a hole upon the starboard side of the Bayport below the water line.

Rec. Brunn, p. 366, Q. 16.

There was considerable water in the forward part of the ship and it was impossible at that time to determine the exact damage which the ship had received upon her starboard side. There were three steamtugs at the ship all employed in the canal and under the control of the canal authorities. On the following morning about 5 o'clock a diver plugged up the hole upon the starboard side. The ships pumps had been going during all this time. Captain Joseph Lewis believed, as well as other persons in the locality and connected with the ship or with the canal that it would be impossible to remove the Bayport from the bank without first removing con-

siderable of her cargo. The discharge of her cargo was, therefore, immediately commenced and after a few tons were removed Captain Joseph Lewis went upon the Salvor with other persons connected therewith, to change the bucket and the gear in order to make a more rapid delivery of the cargo. This fact is not in dispute. At about 10 A. M. while engaged on the Salvor in this occupation the Bayport unexpectedly slid off the bank. On her deck at the time was pilot William Lewis, a canal pilot, and Captain Hammett, her master. Steam had been kept up on the Bayport during all the time since she stranded and her officers and crew were on board attending to their duties. Immediately upon her sliding off the bank, pilot William Lewis and the master of the Bayport went upon the bridge of the Bayport and pilot Lewis assumed charge of her navigation, giving an order to Captain Hammett to start her engines full speed ahead, and gave orders to the tugboats that were alongside. All the tugboats were upon the port side of the Bayport and heading to the westward. The current or tide was running to the eastward. One of the steamtugs got a line to the bow of the Bayport and proceeded ahead of her. There were some dolphins in the channel, twelve or fifteen hundred feet to the eastward of the Bayport. These dolphins were placed there for the purpose of vessels making fast thereto if necessary. About a mile to the eastward of the Grave Yard,

where the Bayport was stranded upon the afternoon of December 13th, she stranded a second time settling upon the bottom in such a way as to practically prohibit navigation of large vessels through the canal until she was removed.

Shortly thereafter the Boston Cape Cod & New York Canal Company, hereafter referred to as the Canal Company, filed its libel against The T. A. Scott Company, Inc., alleging it had sustained damage from the loss of tolls of vessels which were prevented by the sinking of the Bayport the use of the canal, and from damage to the canal in the sum of about \$60,000. The allegations of fault against The T. A. Scott Company, Inc., are:

A.

"In that the defendant (The T. A. Scott Company Inc.) through its agents assumed charge of the Bayport and negligently cared for the said steamer while she was resting upon the bank subsequent to the accident of December 13th, and negligently suffered the said steamer to slide off the bank at a time when the defendant was at fault in not being prepared to complete the navigation of the canal by the Bayport, as the result of which she sank in the canal."

B.

"In that the defendant (The T. A. Scott

Company, Inc.) after assuming charge of the Bayport subsequent to the accident of December 13th, negligently permitted the Bayport to become afloat in the said canal in an unsafe condition for navigation, and negligently failed to be prepared to complete the passage through the canal by the Bayport as a result of which she sank in the canal."

Rec. Bottom Page 5 b.

In article Four of the libel it is alleged that Captain Joseph Lewis, at the request of the owner of the Bayport, took charge of the Bayport with the object of *floating and removing her from the canal.*

Rec. Bottom p. 3.

The allegations of fault charged in the libel are denied by the respondent.

The Canal Company likewise filed a libel against the owner of the Bayport for damages alleged to have been sustained by the Canal Company by reason of the Bayport being unfit in construction and build to proceed through the canal.

The White Oak Transportation Company, as owner of the steamship "Bayport," filed its libel against the Canal Company for the loss of the Bayport, and in that libel the Canal Company

petitioned in under Admiralty Rule 59 The T. A. Scott Company, Inc.

From the foregoing it will be observed that the leading allegation of fault against the Scott Company is that it did not secure the Bayport to the bank of the canal.

The White Oak Transportation Company charge no fault against The T. A. Scott Company, Inc.

POINTS.

I.

The removal of the Bayport from the side of the Canal did not require her to be made fast thereto.

If this allegation of fault against The T. A. Scott Company, Inc. had any materialty the record would probably show some evidence in support thereof. From many witnesses produced by the Canal Company only one witness was interrogated upon this point and that witness, as the evidence shows, was without any experience in salvage operations. This witness, J. A. Kidston, upon one occasion, while his vessel was upon the mud flats, in a creek in California had put an anchor ashore to hold her, and that is about the sum total of his experience in making vessels fast to a bank.

The libellant, upon whom rests the burden of proving its case by preponderance of testimony, rested its case upon the testimony of a witness who admits that he never had any experience in this line of work. On the contrary, the witnesses produced by The T. A. Scott Company, Inc., as to the conduct of the operations in the rescue of the Bayport, are men of large experience in salvage work, and whose duties in that line have called them in wrecking operations over nearly the whole length of the Atlantic coast. T. A. Scott, the president of The T. A. Scott Company, Inc. had been engaged in this line of work about twenty years.

Rec. p. 303, Q. 9.

He is now in charge of all the salvage operations of the United States, in matters maritime.

Rec. p. 303, Q. 13, 14.

He states there was nothing where the Bayport originally stranded at the Grave Yard to which you could affix any object that would remain staple in the ground.

Rec. p. 307, Q. 73.

He personally had been engaged in the salving of vessels in the canal previous to this occasion.

Rec. p. 305, Q. 39.

and he further states it would have taken six anchors, two abreast on the port side, two abreast on the starboard side, and one ahead and one astern in the canal in order to have kept the Bayport to the bank, and these anchors should have weighed from four to ten thousand pounds each.

Rec. p. 308, Q. 84 Et seq.

and it would have taken several days in order to have obtained these anchors and got them to the canal.

Rec. p. 308, Qs. 87-88.

and during that time the vessel was likely to roll over in the canal.

Rec. p. 308, Q. 89.

That is what happened to the steamtug Watuppa in the canal.

Rec. p. 308, Q. 92.

A large number of witnesses were called by the respondent, all of them men of experience, and all of these witnesses agree that in the condition in which the Bayport was stranded in the canal it was obvious that means should at once be employed to move her from the bank, and this

was the object of Captain Joseph Lewis after the hole upon her starboard side was plugged up in removing the cargo in order to release her from the bank. All these witnesses with practical unanimity agree that the only thing to do under the circumstances was just what Captain Lewis did, to repair the damage on the starboard side as far as possible by plugging the hole, pumping the water out and removing her cargo. They state it would be unadvisable under the circumstances to attempt to make the Bayport fast to the bank upon two grounds:

FIRST: Because too much time would be consumed in obtaining the means whereby she could be made fast.

SECOND: Because the only thing under the circumstances to do was to get her off the bank as soon as possible and prevent further injury to her starboard side.

To construct "dead men" to which hawsers could be attached would have taken several days.

Rec. Scott, p. 308, Q. 100.

Holding the Bayport against the bank would have resulted in another puncture to her bottom.

Scott, p. 310, Q. 119-120;
J. I. Kemp, p. 322, Q. 33-34;

Arthur J. Daly. p. 364, Q. 78-79;

A. J. Davis, p. 370, Q. 12.

The Bayport had steam on her boilers, officers and crew were abroad and there were three tugs standing by. One of the witnesses Joseph I. Kemp, was Yard Pilot and Master of steamtugs in the Boston Navy Yard. This witness is thoroughly familiar with Cape Cod canal having been through there many times.

Rec. p. 321, Q. 8.

He very clearly expresses the situation as to what should be done, in the middle of

Rec. p. 320, Q. 14.

where he states, "you would have to have the hole plugged up and the vessel pumped out to float her; and if she could not be floated by pumping the water out to see about discharging her cargo". And in answer to the question "what would be the object in making the Bayport fast to the bank on her starboard side" he states, "no object whatever."

Rec. p. 321, Q. 24.

There is such a unanimity of opinion among the witnesses called by the respondent upon this point that we deem it unnecessary to refer to their evidence at length. The names of these

witnesses are A. J. Daly, formen in charge of the Salvor, familiar with Cape Cod Canal.

Rec. p. 360.

William A. P. Brunn, a diver, employed in the canal blasting and hoisting up boulders for two years previous to the Bayport's stranding.

Rec. p. 365.

He was the diver who examined the starboard side of the Bayport and plugged the hole. He states that there were boulders all along the starboard side of the Bayport.

Rec. p. 366.

A. J. Davis master wrecker of the King & Whitterspoon Wrecking Company of New York.

Rec. p. 370, Q. 12, he states:

"I don't see why they would want to hold her over a rock that had once knocked a hole in her."

I. M. Tooker Superintendent of the Merritt & Chapman Wrecking Company for the past twenty-eight years, who states the proper thing to do was to pump her out, lighten her, and take the coal out of her.

Rec. p. 378, Q. 17-18.

He states it would require at least four anchors to hold her to the bank each anchor from four to five ton.

Rec. p. 378, Q. 23-24.

and you would have to have wire chains and get them from New York, New London, New Bedford and Boston, which would have taken considerable time. He would have proceeded to get the cargo out the same as Captain Lewis did.

Lewis H. Timmans, engaged in salvage operations since 1874, states that the object would be to get the "Bayport" off the bank as soon as possible in order to prevent further damage.

Rec. Timmans, p. 457, Q. 10.

On the Salvor, the lighter alongside the Bayport, owned by the T. A. Scott Company, Inc., were three anchors, one of about 800 pounds, one of about 600 pounds and a kedge of about 200 pounds, which were used for general wrecking purposes.

Rec. Arthur J. Daly, p. 401, Q. 97; p. 401, Q. 100-102.

The libellant had scarcely made any attempt to substantiate this allegation of fault as charged in the libel by evidence; in the light of the evidence produced by The T. A. Scott Company,

Inc., it is clearly apparent that it would be impossible to substantiate such a claim from the testimony of men skilled and experienced in this line of work.

The District Judge upon this allegation of fault found as follows:

"It is charged as a fault against the Scott Company in the libel and intervening petition against it, that it failed to make adequate preparations to hold the steamer safely if she should come off. The evidence that it could not have done so by ground tackle, without greatly delaying salvage work, which would have been inadvisable, *is so clear and convincing that discussion of the point seems unnecessary.*"

Rec. Bottom Page 23.

II.

The Libel alleges fault against The T. A. Scott Company for failure to be prepared to complete the passage through the Canal by the Bayport after she came off the Bank.

In the petition of the Canal Company under Admiralty Rule 59 to make The T. A. Scott Company, Inc., party defendant in the suit of

the White Oak Transportation Company against the Canal Company, the Canal Company alleges fault against the Scott Company as follows:

"In that the Bayport had not been made fast to the bank after she had struck; in that the tugs were headed west without their engines running at the time the Bayport floated; in that The T. A. Scott Company, Inc., through its agents and servants, failed to take proper precautions to hold the Bayport to the bank, or to make suitable preparations to conduct the Bayport through the Canal after she floated."

Rec. Page 93.

The Scott Company, would not be allowed to assume the control of the navigation of the Bayport through the canal after she floated. It was a part of the *modus operandi* of the canal that all vessels while proceeding through the canal, whether they had been salved or not, should be in control of a canal pilot.

E. R. Geer, Superintendent of canal, p. 336, Q. 57; p. 336, Q. 58 and following.

The steamer Chippewa, of the Clyde Steamship Line salved by the Scott Company at Wings Neck, in charge of Captain Joseph Lewis, was not per-

mitted to navigate the canal otherwise than under the charge of a canal pilot under the direction of the Superintendent of the canal.

p. 337, Q. 70, and following questions.

This was previous to December 13, 1916, the date of the stranding of the Bayport.

Superintendent Geer, page 337, Q. 79.

There were other occasions also when Captain Joseph Lewis was not permitted to navigate a vessel through the canal previous to the stranding of the Bayport.

p. 337, Q. 72, and following.

Joseph Lewis had no canal license.

p. 336 Q. 62.

The allegation of fact in the libel that the Scott Company was hired by the owner of the Bayport to take her out of the canal was made with the knowledge of the libellant that on occasions previous to the stranding of the Bayport Captain Lewis had been refused the control of wrecked vessels in the canal, and that on such occasions the canal pilots assumed charge and control of the navigation of the vessel through the canal.

No vessel was allowed to navigate the canal except in charge of a canal pilot.

Superintendent Geer, p. 335 Q. 44.

"The Canal Company absolutely controlled the passing through of the vessels."

Superintendent Geer, p. 343, Q. 159.

The Bayport came off unexpectedly. This fact is unquestioned.

When the Bayport came off, the tide running east, the steamtugs were all upon her port side heading to the westward. This fact has been alleged as a fault and due to the Scott Company, The libellant, however, as in its allegation of fault discussed under Point One, has failed to introduce any proof in support of the allegation excepting the testimony of the witness Kidston, a man without experience in the tugboat business.

Kidston p. 280, Q. 22-23.

To the question of the libellant "Would you have the tugs facing the same way the ship is facing" he answered, "Well, it would not be altogether necessary, but that would be the most reasonable way, a tug can go astern as well as she can go ahead."

p. 280, Q. 18.

The Libellant produced no further testimony upon this allegation of fault.

The libellant examined the masters of the three steamtugs and canal pilots—the steamtug Dalzelline, the John C. Stuart and the Hazelton. All of these men were so closely related to the Canal Company as to be practically in its employ. These tugboat masters were not interrogated by the libellant upon this charge of fault that the tugs were heading to the westward instead of to the eastward at the time the Bayport came off the bank. The issue, however, has been met by the respondent in the production of proof that the tugboats at the time the Bayport slid off the bank, were heading in the proper direction. Lyman J. Robbins master and pilot, in the service of the Boston Towboat Company,

Rec. p. 384, p. 385, Q. 21;

Benjamin Kemp, master and pilot, connected with the Boston Navy Yard,

Rec. p. 388.

Other witnesses gave testimony in support of the same fact.

T. A. Scott, pp. 309, Q. 110.

Jas. I. Kemp, p. 321.

When the Bayport came off the bank William

Lewis, canal pilot, immediately went to the bridge and assumed command.

When the "Bayport" slid from the bank of the canal Captain Joseph Lewis was on the "Salvor." Looking upon the bridge of the "Bayport" and observing Pilot William Lewis in charge Captain Joseph Lewis remarked to him "she is up to you," or words to that effect.

Captain Brennan, who was upon the Salvor at the time the Bayport slid off the bank, states that pilot Lewis said to Captain Lewis, who was on the Salvor "get your lighter away * * * * let go your lighter."

Rec. page 394, Q. 19.

Fullerton, Engineer of the Salvor, states that when the Bayport came off the bank Captain Joseph Lewis said to Pilot Lewis "she is all yours".

Rec. p. 400, Q. 11,

and to this he heard no reply.

Rec. p. 401, Q. 18.

McDonald, who was on the bow of the Bayport, states that Captain Lewis of the Scott Company said to Pilot William Lewis "she is up to you, Captain Lewis." The pilot replied "I have got her, and at the same the pilot raised one of his

hands, I don't know which one." This witness was almost directly under the bridge of the Bayport and does not remember of any other conversation.

Rec. p. 138, Q. 23.

Daly, the foreman in charge of the "Salvor", states when the Bayport came off Captain Lewis said to Pilot Lewis on the bridge of the Bayport "She is yours, you have got her, I can't say just exactly which, and he Pilot Lewis waved his hand."

Rec. p. 362, Q. 43.

On page 362, Q. 44:

"Q. Who waved? A. Pilot Lewis,—asking where to put her, 'at the dolphins?' 'All right,' 'yes,' was the answer."

Captain Hammett, of the "Bayport," states that Captain Joseph Lewis told Pilot William Lewis "the ship is up to you."

Captain Hammett, p. 446, X-Q. 405, et sec.

On the following morning when Captain Geer arrived at the office of the Canal Company he inquired of the clerk "where is Pilot Lewis" and

the clerk said "he is down at the wreck;" and Captain Geer said, "all right."

Rec. Geer, p. 339, Q. 103.

There was no one from the respondent on board of the Salvor excepting McDonald, an employee of the Scott Company, who went to Cape Cod Canal from Boston upon the Salvor.

Rec. p. 137, Q. 8.

At the time the Bayport slid off the bank he was in the forward house, trying to locate a place to hook a tackle to lower a pump down to the forepeak.

Rec. p. 137, Q. 10.

He was the only employ of the Scott Company at the time on the Bayport and he had nothing to do with her navigation. Captain Geer, the Superintendent of the canal, states that William Lewis, pilot, took charge of all the tugboats and directed operations of matters connected with the navigation of the canal in his absence, for which he was paid the sum of \$25.00 monthly more than the other pilots.

Rec. Geer p. 334, Q. 25.

The respondent was *not* permitted to assume charge of the navigation of the Bayport through

the canal and as a matter of fact had nothing to do with the navigation of the Bayport through the canal. Upon this point the District Judge held:

"When she floated, it immediately surrendered her to her master and pilot, who accepted her without objection; therefore it exercised no control over her movements. No sufficient reason appears *for holding it at fault in any respect.*"

Opinion, p. 25, middle of page.

The evidence is clear that Pilot Lewis was instructed to get the Bayport out of the canal as soon as possible. These were his instructions on the day before from Superintendent Geer of the canal.

Rec. Geer p. 338, Q. 90.

When Superintendent Geer arrived shortly after the stranding of the Bayport on the shore of the canal opposite to the locality of her stranding, and all of the steamtugs being at the Bayport, he *halloed* to Pilot William Lewis, that if the boat came off "to get her through the canal as soon as possible."

Superintendent Geer, p. 338, Q. 86-87-88-89-90-91.

LeCompte, master of one of the tugboats, states that it was his orders to take her off if he could and get her out of the canal, take her to the eastward.

Rec. LeCompte, p. 198, X-Q. 133.

Donnelly, a witness for the Canal Company, states that when the the Bayport slid off the mate of the tugboat Dalzelline shouted to Captain Lewis that "the Bayport should be held back, that it was a bad time to get out with the tide and the boat in the condition she was in."

Rec. Donnelly, p. 217, Q. 38.

Counsel for the Canal Company asked the witness as follows:

"Q. What reply did Captain Joe Lewis make to that suggestion? A. Well, he told him that he knew his business. He said 'Do as I tell you, Cap.'"

Rec. Donnelly, p. 217, Q. 41.

It appears that the Captain Lewis to whom the witness referred was not Joseph Lewis but Pilot William Lewis, who was on the bridge of the Bayport.

Rec. Donnelly, p. 218, X-Q. 53.

Whatever may have been the causes operating toward the stranding of the Bayport upon the second occasion the respondent had no connection with it directly or indirectly. They neither were in charge of her navigation or assisting in the navigation of the Bayport.

Pilot William Lewis claims he was a mere on-looker and spectator at the time the Bayport came off the bank. As a matter of fact at the time the Bayport became stranded Pilot William Lewis was day captain of the steamtug Stuart.

Rec. Lewis, p. 166, Q. 93-94 and 95.

He was also a canal pilot. And immediately after he denied that he was in charge of any steamtug.

Rec. Lewis, p. 166, X-Q. 97.

Early in the morning of the 14th Pilot Lewis went over to the eastern end of the canal in the tug Hazelton and found the Salvor just coming in and took her in tow and towed her back to the wreck.

Rec. Lewis, p. 162, Q. 51.

He states, when asked if he expected the Bayport was coming off, "that he didn't give it a thought."

Rec. Lewis, p. 168, X-Q. 135.

He admitted that in a hearing before the United States Local Inspectors he stated "he thought everybody did all that was possible to do." "The ship came off so sudden there was no time to make up your mind what to do."

Rec. Lewis, p. 169, X-Q. 141.

He also states that he gave no orders for the Salvor to cast off her lines.

Rec. Lewis, p. 172, X-Q. 163.

And yet nearly every witness interrogated on this point who was on the Salvor states that Pilot Lewis did give the order.

Pilot Lewis evidently intends to escape criticism for assuming charge of the navigation of the Bayport after she came off the bank. He did, however, assume command and authority and the Superintendent of the canal had directed Pilot Lewis to take the Bayport out of the canal as soon as she came off. When she came off the bank, excepting that her bow was down by the head some 18 or 19 inches, she was in as fit a condition to go through the canal, outside of tidal currents, as she was the day before. Steam was up on her boilers, officers and crew were all aboard, and a canal pilot on her bridge. The damage to her side had been repaired, the hole plugged up and most of the water pumped out. The book the Canal Company distributed to the

public containing instructions for the navigation of the canal, expressly reserved to itself full authority in all salvage operations in the canal.

Exhibit No.

The Scott Company were in charge of the Bayport in so far as control thereof was necessary for the purpose of getting her off the bank. The means at hand in the canal were insufficient to float the Bayport and men experienced in floating steamers were needed in order to float her. This could only be accomplished by repairing her body under water, pumping out the water and removing a sufficient amount of her cargo to float her. When that had been accomplished and she had floated with her officers and crew on board, steam up, and a canal pilot on board there was nothing for the Scott Company to do which could be of any assistance to either the Canal Company or to the owner of the boat. The Scott Company were not engaged in pilotage on the canal or in the transportation of vessels on the canal. Pilotage and transportation were exclusively within the jurisdiction of the Canal Company, and Captain Joseph Lewis, representing the Scott Company, knew it by his previous relations with the Canal Company, and Captain Joseph Lewis did not attempt to assume any authority in the navigation of the Bayport.

When stranded vessels which are in charge of

wreckers have been released from their peril and floated while the master and crew are aboard the ship becomes at once automatically under the authority and command of its master. This fact is well illustrated by the testimony of T. A. Scott in reply to a question by counsel for the Canal Company.

"Q. That is, that is really the duty of the one conducting the operation, to retain control of the ship until she is safely floated, it is not, and perhaps even beyond that, up to the time of delivery to the owner? A. Not if the vessel is under steam and in command, no sir. The moment the vessel floats she automatically goes under the command of the man who has charge of the vessel, not the salvor, that is the practice."

"Q. Without any regard to her condition? A. Why, I have already said, if the vessel was under steam and had her own power."

Rec. Scott, p. 314, X-Q. 158-159.

The respondent is charged with a fault for failure to keep the Bayport on the bank, and yet the libellant with all the power it could command at the canal before the arrival of Captain Joseph Lewis was attempting to get the Bayport off the bank.

It is indisputable that the canal company had sufficient power in the canal and alongside the

Bayport to have controlled her operations after she came off the bank.

Not only has the libellant failed to prove this allegation of fault by a preponderance of testimony but it can almost be said that the libellant has failed to produce any testimony in support of its allegations of fault against the respondent.

The Circuit Court of Appeals found that the Bayport unexpectedly slid off the bank (Rec. p. 549) and that court also held "he (the master of the Bayport) was upon the bridge of his vessel at that time with the pilot and must be held to have assented to the turning over of the vessel by the Scott Company, and we think, as did the Judge below, that it was relieved of further responsibility and that the Bayport went forward on her own account."

Rec. p. 554.

III.

The request of the White Oak Transportation Company to the respondent to go to the assistance of the Bayport implied a salvage contract in the performance of which the respondent would be liable only for failure to act in good faith and with reasonable judgment and skill.

As to contract see

The Excelsior, 123 U. S., p. 40

Queen of Pacific, 21 Fed. Rep. p. 470

(Bottom of page).

Also the recent case of

*Great Lakes Towing Company vs. St.
Joseph—Chicago Steamship Company,*
253 F. R. p. 635.
Circuit Court of Appeals 7th Circuit.

As to liability see

The Infanta Maria Teresa, 188 U. S. at
page 289.

“Salvors are not held responsible for a loss
“when attempting salvage in good faith and
“with reasonable judgment and skill.”

The S. C. Schenk, 158 F. R. p. 54 at p.
63.

“It would be an extraordinary proposition
“that a tug attempting a rescue of a vessel
“in the very jaws of ship-wreck should be
“held liable for even an error in the effort.”

This case was affirmed on appeal to the United
States Circuit Court of Appeals. Sixth Circuit,

Judge Lurton writing the opinion, in which he holds:

"Salvage services in the public interest should be encouraged. A decree * * * under the circumstances would tend to discourage such efforts."

Same Reference, at p. 60.

It must be borne in mind, however, that this stranding was in a canal, the navigation and pilotage of which was exclusively in the hands of the Canal Company, or at least asserted and published by the Canal Company and practiced by the Canal Company.

The Canal Company were expressly authorized by its charter "to maintain and operate steam and other vessels for transportation, and steamtugs or may use any other means or methods for assisting vessels in their approach to and passage through and from the canal."

Special Act Massachusetts Legislature,
Acts of 1899, Chapter 488, Section 3.

The above fact is amply shown by the statement of Superintendent Geer that when the Bayport came off the bank Pilot William Lewis was in full charge.

Rec. Superintendent Geer, p. 339, Q. 109.

It is claimed that the fact that Captain Joseph Lewis had no license for the canal should not have prevented him from assuming charge of the navigation of the Bayport after she came off the bank.

But there was no emergency calling for the exercise of the skill of men experienced in salvage operations after the Bayport came off the bank. Men familiar with the navigation of the Bayport, men familiar with the navigation of the canal, were the men called upon to act when the Bayport slid off the bank and they were there, but they were not the Scott Company.

This claim on behalf of the Canal Company is fully answered by the refusal of the Canal Company to permit Captain Joseph Lewis to assume charge of the wrecked steamer "Chippewa" in proceeding through the canal.

IV.

We respectfully submit that the decrees of the District Court and the Circuit Court of Appeals dismissing the libels against The T. A. Scott Co. should be affirmed.

SAMUEL PARK,
HENRY E. MATTISON,
Proctors for T. A. Scott Co., Inc.

AUG 4 1920

JAMES D. MAHER,
CLERK.

No. 4116

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

WHITE OAK TRANSPORTATION COMPANY,
PETITIONER,

v.

BOSTON, CAPE COD & NEW YORK CANAL
COMPANY, RESPONDENT.

WHITE OAK TRANSPORTATION COMPANY,
PETITIONER,

v.

BOSTON, CAPE COD & NEW YORK CANAL
COMPANY, RESPONDENT.

NOTICE, PETITION FOR WRIT OF CERTIORARI
AND
BRIEF FOR THE PETITIONER.

EDWARD E. BLODGETT,
Counsel for Petitioner.

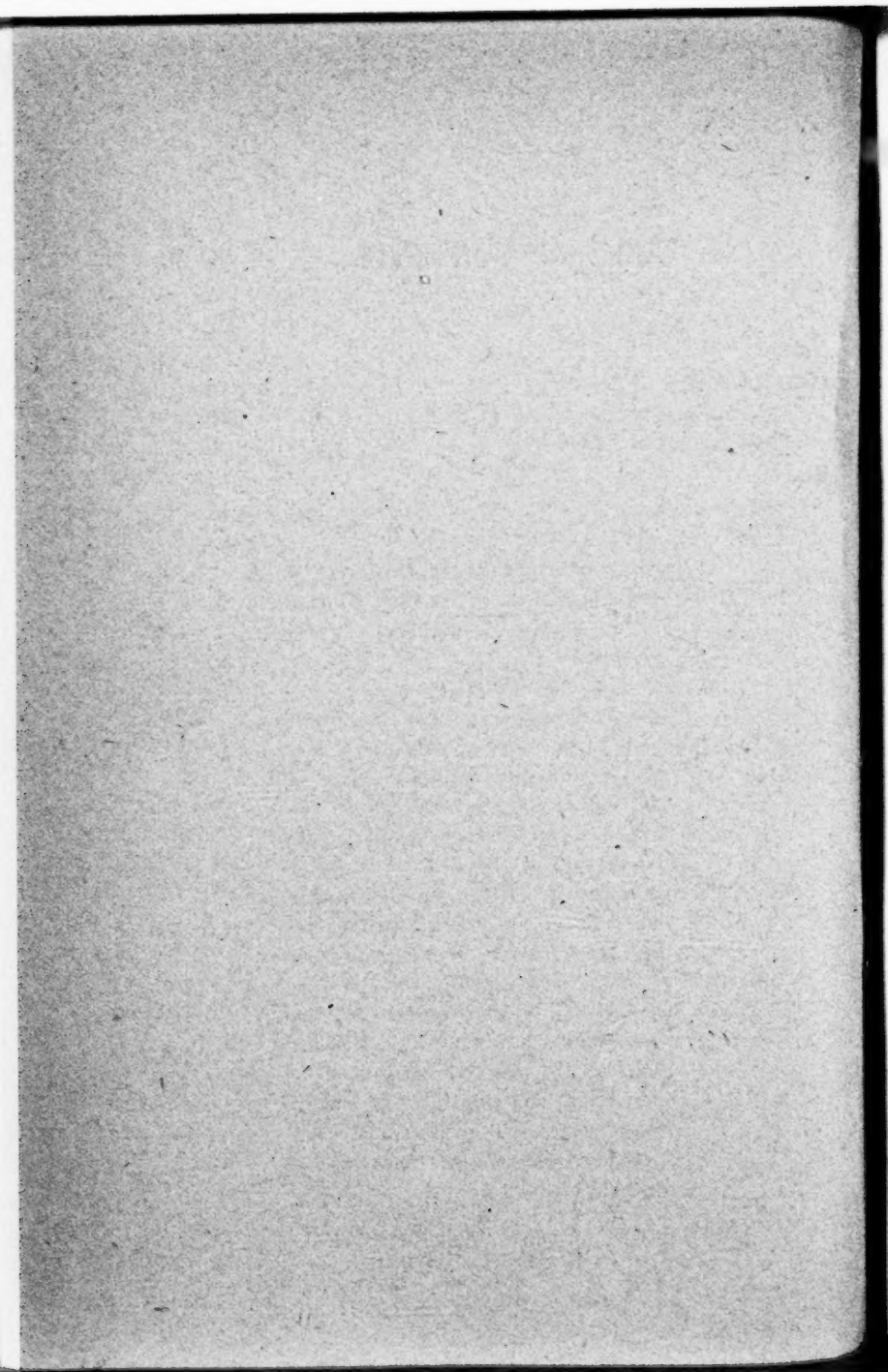


TABLE OF CONTENTS.

	Page
Notice	1
Petition for Writ of Certiorari	3
Special Reasons for Allowance of Petition	10
Assignments of Error	10
Brief	13
Statement of Facts	13
Points	19
I. The Circuit Court of Appeals erred in the finding that the petitioner was at fault for allowing its vessel to enter the canal	19
II. The Circuit Court of Appeals erred in not dividing damages upon finding that both parties were at fault	27
III. The Circuit Court of Appeals erred in not ruling that the existence of the two shoals in the canal were proximate causes of both strandings	33
IV. The Circuit Court of Appeals erred in not ruling as a matter of law that the first stranding was the proximate cause of the second stranding	50
V. The Circuit Court of Appeals erred in not ruling as a matter of law that the burden was upon the respondent to prove not only that the strandings were not caused by the shoal spots but that they could not have been so caused	54

	Page
VI. The Circuit Court of Appeals erred in holding the petitioner at fault for the act of the master of the Bay Port in allowing his steamer after she came afloat to proceed through the canal, though under the orders of the canal superintendent	55
VII. The Circuit Court of Appeals in holding the petitioner at fault for the second stranding erred in not applying the <i>in extremis</i> rule	57
Conclusion	66

OTHER AUTHORITIES CITED.

(1) Abbott on Shipping, Part III, Chap. 1, § 2	32
(2) Benedict on Admiralty, § 471	32
(3) Cleirac U. S. et Coutume de la mer, 55	31
(4) Hopkins on Average, 189	31
(5) Hughes on Admiralty, 276, 277, 192, 208	32
(6) Laws of Oleron, Article 14	29
(7) Laws of Wisbuy, Article 27	29
(8) Lushington, 388	33
(9) Maclachlin on Merchant Shipping, 274	32
(10) Ordonnance of Louis XIV, Title 7, Sections X and XI	29
(11) 1 Pardessus Collection de Lois Maritime, 334	31
(12) 1 Peters Admiralty Decisions, App. XXIII	31

TABLE OF CASES CITED.

	Page
The Alabama and The Gamecock, 92 U. S. 695	30
The Annie R. Lewis, 50 Fed. 556	34
The Atlas, 93 U. S. 302	30
Atlee v. Packet Co., 21 Wall. 389	31
The Aurania and the Republic, 29 Fed. 98, 116	27
Barber v. Lockwood, 134 Fed. 985	27, 34
Belden v. Chase, 150 U. S. 674	30
Boston, Cape Cod & New York Canal Co. v. Staples Trans. Co., 246 Fed. 549	33, 37
The British Isles, 264 Fed. 318	53, 64
The Buckhurst, 6 P. D. 152	65
The Calvin P. Harris, 33 Fed. 295	34
The Catherine, 17 How. 170	10, 30
Cayzer v. Carron Co., 9 App. Cas. 873	30
The Cetus, 202 Fed. 189	65
The Chicago, 100 Fed. 999	65
The City of New York, 147 U. S. 72	64
Daly v. Quinlan, 131 Fed. 394	34
The Dauntless, 121 Fed. 420	39, 55
The Daylesford, 30 Fed. 633	32
The Ellis, 152 Fed. 981	39, 55
The Eugene F. Moran, 212 U. S. 466	30
The E. V. McCauley, 189 Fed. 827	57
The Garden City, 127 Fed. 298	57
Garfield & Proctor Coal Co. v. Rockland-Rockport Lime Co., 184 Mass. 60	42
Hartford & N. Y. Trans. Co. v. Hughes, 115 Fed. 981,	34
The Hercules, 73 Fed. 255	57
The John A. Berkman, 6 Fed. 535	34
The John Fraser, 21 How. 184	30
The Kirnwood, 201 Fed. 428	64
McKinley v. Morrish, 21 How. 343	27
The Manitoba, 122 U. S. 97	30

	Page
The Maria Martin, 12 Wall. 31	30
The Max Morris, 137 U. S. 1	31, 32
The Milan, Lush. 388	33
The Natchez, 78 Fed. 183	47
Nickerson v. Tirrell, 127 Mass. 236	42
The North Star, 106 U. S. 17	30
The Oregon, 158 U. S. 186	10, 64
Otis v. I. M. Luddington's Sons, Inc., 229 Fed. 454	42
The Pacific, 154 Fed. 943	65
The Parker, 28 Fed. 156	57
Parnaby v. Lancaster Canal Co., 11 Ad. & El. 223, 243,	34
The Pennsylvania, 19 Wall. 125	9, 10, 39, 53, 54
The Philadelphia, 199 Fed. 299	65
The Queen City, 189 Fed. 653	65
The Queen Elizabeth, 122 Fed. 406	64
Riddle v. Props. of Locks & Canals on the Merrimac River, 7 Mass. 169	34
Robinson v. Navigation Co., 73 Fed. 883	32
Ross v. M. & M. T. Co., 104 Fed. 302	64
The Sam Sloan, 65 Fed. 125	47
The Sapphire, 11 Wall. 164	30
Seaboard Trans. Co. v. Boston, Cape Cod & New York Canal Co., unreported (Mass. Dist. Ct. Files, civil No. 1506)	35, 37
The Selje, 243 U. S. 291	39, 55
Smith v. Burnett, 173 U. S. 430	34
The Star of Hope, 9 Wall. 203, 230-231	57
The Thielbek, 241 Fed. 209, 216	39, 55
Thompson v. Winslow, 128 Fed. 73	61
Tow Boat No. 1, 74 Fed. 906	47
The Union S. S. Co. v. N. Y. & Va. S. S. Co., 24 How. 307	30
Union Ice Co. v. Crowell, 55 Fed. 87	34
The Victory, 63 Fed. 631, 68 Fed. 395, 168 U. S. 410,	32, 64
The Washington and the Gregory, 9 Wall. 513	30
The Yankee, 203 Fed. 73	27

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

WHITE OAK TRANSPORTATION COMPANY,
PETITIONER,

v.

BOSTON, CAPE COD & NEW YORK CANAL
COMPANY, RESPONDENT.

WHITE OAK TRANSPORTATION COMPANY,
PETITIONER,

v.

BOSTON, CAPE COD & NEW YORK CANAL
COMPANY, RESPONDENT.

NOTICE.

The respondent is hereby notified that the annexed petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit and the annexed brief in support thereof will be submitted to the Supreme Court of the United States at the opening of court on the fourth day of October, 1920, or as soon thereafter as counsel can be heard.

Dated August 2, 1920.

EDWARD E. BLODGETT,
Counsel for Petitioner.

BLODGETT, JONES, BURNHAM & BINGHAM,
Proctors.

To CURRIER, YOUNG & PILLSBURY, *Proctors for* BOSTON,
CAPE COD & NEW YORK CANAL COMPANY;
WARNER, STACKPOLE & BRADLEE, *Proctors for* NORTH-
ERN COAL COMPANY;
PARK & MATTISON, *Proctors for* THE T. A. SCOTT
COMPANY, INC.

BOSTON, August 3, 1920.

The foregoing notice is hereby accepted and delivery of a copy of the petition for Writ of Certiorari and brief in support thereof is hereby acknowledged.

CURRIER, YOUNG & PILLSBURY,
Proctors for BOSTON, CAPE COD & NEW YORK
CANAL COMPANY.

WARNER, STACKPOLE & BRADLEE,
Proctors for NORTHERN COAL COMPANY.

PARK & MATTISON,
Proctors for THE T. A. SCOTT COMPANY, INC.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

WHITE OAK TRANSPORTATION COMPANY,
PETITIONER,

v.

BOSTON, CAPE COD & NEW YORK CANAL
COMPANY, RESPONDENT.

WHITE OAK TRANSPORTATION COMPANY,
PETITIONER,

v.

BOSTON, CAPE COD & NEW YORK CANAL
COMPANY, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States :

The petition of White Oak Transportation Company respectfully represents to this Honorable Court as follows :

At about 2.15 P. M. December 13, 1916, the whaleback collier Bay Port, owned and operated by the petitioner, while proceeding through the Cape Cod Canal, owned and operated by the respondent, upon the solicitation of the respondent and upon the payment of tolls, sheered into the southerly bank of the canal, and remained fast aground. At about 10.15 A. M. December 14, said steamer while in charge of a professional salvor, The T. A. Scott Company, Inc., unexpectedly came afloat, and while completing her trip through the canal she sheered again and

struck the northerly bank of the canal, sustaining damages by both strandings from which she finally sank and became, with her cargo, a total loss.

Short distances before reaching both points where the vessel struck, it is admitted that there were places in the channel of the canal, well known to the respondent but unknown to the petitioner, where there were from six to seven feet less of water than the required statutory depth of 25 feet. The canal was constructed under a statute of the Commonwealth of Massachusetts, which required a depth of 25 feet at mean low water, and this depth was *guaranteed* in a publication of the Canal Company of which the master of the Bay Port had notice. *All the testimony in the case is to the effect that if there had been the required depth of water, neither accident would have happened.*

There was also undisputed evidence that the north bank of the canal had been left in an incompleated state forming a knuckle at a point shortly above where the first stranding occurred, causing a deflection of the current towards the southerly bank of the canal; and the bottom of the channel in that locality had been left in an extremely jagged condition, causing swirls and cross currents.

The respondent filed a libel in admiralty in the sum of \$60,000 against The T. A. Scott Company, Inc., which company undertook the salvage of the vessel from her first position aground, claiming damages for blocking up its canal, and upon this libel no petition is pending.

At the same time the respondent filed a libel in the same amount against the petitioner claiming the same damages and alleging that the petitioner was at fault for allowing said steamer improperly to enter said canal when she was difficult to steer and control and further that the petitioner was at fault in not removing her from

her sunken position. *No allegation is made that the petitioner was negligent in the navigation or management of its vessel; in fact it is affirmatively stated by the respondent that proper steps were taken in her management and operation at all the times while in the canal.*

The petitioner filed its libel in the sum of \$306,000 against the respondent seeking to recover damages for loss of its steamer, alleging negligence among other things by reason of the improper condition of the canal as shown by the shoals, the knuckle, and the irregular condition of the bottom heretofore mentioned, and also alleging negligent operation and management of its canal.

The cargo owner, the Northern Coal Company, intervened by petition in said action to recover damages in the sum of \$12,464 for loss of its cargo, and the Canal Company, under admiralty Rule 59, petitioned in The T. A. Scott Company, Inc., as a party respondent.

All of the cases were tried together by agreement of counsel, although not formally consolidated for trial by order of the court.

The District Court found in favor of the respondent in all three cases.

In regard to the first stranding, it held that the owner of the Bay Port was at fault because of improper handling of the Bay Port between the time she began to sheer after passing the first shoal spot and the time she struck the bank. This finding was made without any testimony upon which to base it, and without any foundation in the pleadings; *in fact contrary to the affirmative pleading of the respondent that the vessel was handled properly.* The District Court exonerated the Canal Company from fault, holding that the first shoal was not the proximate cause of the stranding. With reference to the second stranding the District Court found no fault on the part of any of the three parties, and considered the accident as inevitable.

The libellants in all three cases and the intervening petitioner duly took appeals which were heard and argued before the Circuit Court of Appeals for the First Circuit.

The Circuit Court of Appeals in considering the first stranding held that the shoal was not the proximate cause, but found both parties at fault for allowing this vessel to enter the canal; *but instead of applying in these admiralty cases the well-established admiralty rule of half damages the Circuit Court of Appeals applied the common law rule, and neither the petitioner nor the respondent nor even the owner of the cargo, the intervening petitioner, was allowed to recover.*

IN FINDING THAT THE PETITIONER WAS AT FAULT FOR ALLOWING ITS VESSEL TO ENTER THE CANAL THE CIRCUIT COURT OF APPEALS WAS IN ERROR.

The facts bearing upon this question are as follows: —

The respondent knew the vessel, her type and draft; there was nothing in reference to the construction of the vessel or her trim or equipment that was concealed or misrepresented. The respondent solicited the business and requested the petitioner to allow the Bay Port to use the canal loaded as she was. The respondent charged tolls for such use, and the petitioner paid the same. The petitioner had no knowledge as to the conditions existing in the canal except the depth required by statute and by respondent's advertisements, which if true would warrant the trip through the canal loaded. The decision to make this particular trip through the canal was that of the master of the vessel, based upon weather conditions, convenience in time saving and safety of his ship in avoiding the Nantucket Shoals. The petitioner had no knowledge that on this particular occasion the Bay Port would attempt passage through the canal.

The learned Judge of the District Court found as follows: —

"The Bay Port was a whale-back steamer 265 feet long, carrying about 2,400 tons of coal. On the evidence now before the court she appears to have been a staunch vessel properly manned, supplied and equipped. No failure of her mechanism entered into either accident. She steered as well as the ordinary whale-back steamer; but vessels of that type do not handle as sharply, nor as well, as those of the usual deep-sea model. She was deeply laden; but not so as to interfere with her ability to manoeuvre."

Morton, J., Rec. p. 23.

The learned Judge of the District Court further found and ruled that the petitioner was not at fault for allowing the steamer to enter the canal, stating as follows:—

"As to the libel of the Canal Company against the Transportation Company; the first three charges of fault in this libel allege (in substance) negligence on the part of the owner of the Bay Port in taking her into the canal at all, on the ground that she did not steer well enough to attempt the passage of such a place with safety. It does not appear, however, that the ability of the Bay Port to manoeuvre was inferior to that of the ordinary steamer of her size and type. It was a fairly common type, the characteristics of which were known to the Canal Company. The Transportation Company had been solicited by the Canal Company to send its steamers, including the Bay Port, through the canal. It can hardly be held negligent for accepting the invitation of the libellant. These charges are not sustained."

Morton, J., Rec. p. 31.

In determining the cause of the second stranding, the Circuit Court of Appeals held that although the respond-

ent was at fault in allowing the Bay Port to enter the canal, it did not *assent to her navigation of the canal in the trim in which she was when she slid off the bank*; that the second shoal was not the proximate cause of the second stranding; and that the petitioner was at fault because the master of the Bay Port did not take over the navigation of his vessel from the canal pilot and attempt to hold her by tugs in the canal or tie her up to dolphins until she could be pumped out and her cargo trimmed.

The facts relative to this stranding are as follows: By reason of the first accident, water entered the hold of the steamer, wetting her cargo and causing her to be down by the head with a slight list to port when she came afloat and started to drift along the canal, and it follows therefore that the second stranding was the direct and proximate result of the first stranding for which the Circuit Court of Appeals held the respondent at fault unless the acts of omission of the master in not holding the vessel in the canal by tugs or tying her to dolphins acted to break the train of causation.

The master of the Bay Port was wholly unfamiliar with the canal and its navigation. The man who was piloting the Bay Port was a canal pilot and a representative of the canal superintendent. The only tug available at any time between the time the Bay Port came afloat and the second stranding was the Dalzelline, and there is no evidence whatever in the case that this tug alone could have held the Bay Port in the swift current of this narrow waterway, and the District Court has found that there was no evidence that the master of the Bay Port had any knowledge of the existence of the dolphins. Furthermore, in order to retrim the ship with this bulk cargo of soft coal saturated with water — a suggestion intimated by no one in the whole case except the Circuit Court of Appeals —

it would have been necessary to have discharged the vessel from the forward hatch with the aid of derricks and derrick lighters, an operation obviously impractical under the circumstances. Furthermore any omission by the master of the Bay Port to act in this sudden emergency of her coming afloat was an error of judgment *in extremis*, for which under well established admiralty principles the petitioner is not liable.

In ruling that the shoals were not the proximate causes of the strandings, the Circuit Court of Appeals has attached no significance to the fact that the vessel traversed half the distance in the canal without difficulty and then sheered into the bank in each case within a short distance after passing each of these two shoals, which had been allowed to make up in violation of the statutory requirement; and it has totally ignored the rule laid down in the Pennsylvania case.

The Pennsylvania, 19 Wall. 125,

that the burden is upon the respondent to show not only that the shoals did not cause, but that they could not have caused, the strandings.

The mandates in the two cases in which the petitioner is a party are stayed pending a decision on the within petition.

A certified copy of the entire record of said cases in the Circuit Court of Appeals is herewith furnished as part of this application in conformity with Rule 37 of this Honorable Court relative to cases from the Circuit Court of Appeals and all original exhibits not capable of reproduction in the record are likewise herewith submitted as part of this application.

SPECIAL REASONS FOR ALLOWANCE OF PETITION.

1. The Circuit Court of Appeals in its decision of these cases has ignored the principles established in other leading cases and fundamental rules of the admiralty law in

(a) Not applying the half damage rule.

The Catharine, 17 How. 170.

(b) Not applying the rule of

The Pennsylvania case (*supra*).

(c) Not applying the *in extremis* rule.

The Oregon, 158 U.S. 186.

2. A considerable and increasing part of inland commerce is now carried through canals, and numerous lake-built steamers have been in the past few years passing through canals from the Great Lakes to the Atlantic seaboard both with and without cargoes, and the rights and liabilities of the owners of these vessels are vitally affected by the decision in this case if the well-established admiralty principles are to be abolished in favor of common law rules.

ASSIGNMENTS OF ERROR.

The petitioner submits that the Circuit Court of Appeals erred in the following particulars:—

1. In finding that the petitioner was at fault in allowing its vessel to enter the canal.

2. In holding, after finding the petitioner at fault in allowing its vessel to enter the canal and the respondent likewise at fault, *that neither the petitioner, nor the respondent nor the cargo owner is entitled to recover.*

3. In not ruling as a matter of law that the two shoal spots over which the steamer passed just prior to both strandings were the proximate causes of the two strandings.

4. In not ruling as a matter of law that the first stranding was the proximate cause of the second stranding.

5. In not ruling as a matter of law that, inasmuch as the respondent admitted that the canal did not have the required statutory depth of water upon either of the shoal spots over which the steamer had passed just prior to each stranding, the burden was upon the respondent to prove not only that each stranding was not caused by such shoal spots, or either of them, but that they could not have been so caused.

6. In holding the petitioner at fault for the act of the master of the Bay Port in allowing his steamer to proceed through the canal after she came afloat when the canal superintendent, acting under the canal regulations, had ordered the vessel through to the Sandwich end.

7. In not ruling as a matter of law that if the captain of the Bay Port acquiesced in the action of the canal pilot, taken under order of the canal superintendent and if such acquiescence was in accordance with his best judgment, even if it proved wrong, it was an error *in extremis* for which the petitioner should not be held liable in whole or in part.

In support of these points the petitioner submits its brief hereto annexed.

Wherefore your petitioner respectfully prays that a Writ of Certiorari may be issued out of and under the seal of this Court directed to the United States Circuit Court of Appeals for the First Circuit, commanding the said Court to certify and send to this Honorable Court, on a day certain to be therein designated, a full and complete transcript of the court record and all proceedings of said Circuit Court of Appeals in the cases entitled in that court: "Boston, Cape Cod & New York Canal Company *v.* White Oak Transportation Company, No. 1398", and "White Oak Transportation Company *v.* Boston, Cape Cod & New York

Canal Company, The T. A. Scott Company, Inc., impleaded, No. 1399", to the end that the said cases may be reviewed and determined by this Court as provided by the law and practice of a court of admiralty, and that your petitioner may have such other and further relief in the premises as to this Court may seem just and proper.

WHITE OAK TRANSPORTATION COMPANY,
by GEORGE HAWLEY,
President and General Manager.

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, SS.

BOSTON, August 2, 1920.

George Hawley, being duly sworn, deposes and says that he is president and general manager of the White Oak Transportation Company, petitioner above named, and that the matters stated in the foregoing petition are true to the best of his knowledge, information and belief.

GEORGE HAWLEY.

Subscribed and sworn to before me this second day of August, 1920.

FOYE M. MURPHY,
Notary Public.

I hereby certify that the foregoing petition is presented in good faith and not for the purpose of delay, and that in my opinion the case is a proper one for the issuance of a Writ of Certiorari.

EDWARD E. BLODGETT,
Counsel for the Petitioner.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

WHITE OAK TRANSPORTATION COMPANY,
PETITIONER,

v.

BOSTON, CAPE COD & NEW YORK CANAL
COMPANY, RESPONDENT.

WHITE OAK TRANSPORTATION COMPANY,
PETITIONER,

v.

BOSTON, CAPE COD & NEW YORK CANAL
COMPANY, RESPONDENT.

BRIEF FOR THE PETITIONER

IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF FACTS.

The petitioner was the owner and operator of the steamer Bay Port, a steel collier of the ordinary whale-back type, of 1,399 tons gross, 1,075 tons net, 265 feet in length and 38 feet in width, of the value of about \$295,000. At the time of the accidents hereinafter set forth, the steamer had on board a cargo of 2,393 tons of coal, the property of the intervening petitioner, Northern Coal Company, of the value of about \$12,500. The vessel had been first used on the Great Lakes, but for many years had been operated on the Atlantic coast, engaged in the carriage of coal from Norfolk, Virginia, to New England ports.

The respondent is a Massachusetts corporation organ-

ized and existing under a special Act of the Massachusetts legislature (Acts of 1899, Chapter 488), which provided among other things that "said canal when constructed shall have a depth of not less than 25 feet at mean low water".

At the time of the accidents hereinafter mentioned, the canal had been constructed, and representation had been made by the respondent through public advertisements that there were 25 feet of water throughout the channel of the canal at mean low water. *This representation was in fact untrue to the knowledge of the respondent at the time of the accidents in question.*

The previous trips of this collier when loaded had been by the outside route around Cape Cod. On two occasions when light she had proceeded through the canal to the westward without any difficulty.

A short while before the accidents hereinafter set forth, a special duly authorized representative of the respondent called on the petitioner and requested the petitioner to send its whaleback colliers (one of which was the Bay Port) through the canal on their trips to the eastward with coal. (Ints. 81 and 82, Rec. p. 81, and Answers thereto p. 94; Morton, J., Opinion, Rec. p. 31; Geer, X-Q. 163-165, Rec. p. 410.)

The petitioner, being told by the respondent's representative that the canal was completed and that it had 25 feet of water in the channel at all points at mean low water, gave instructions to its masters, including the master of the Bay Port, that they were at liberty to use the canal when bound to the eastward with cargoes, if they desired to do so. The master of the Bay Port had received from the respondent a pamphlet (Petitioner's Exhibit No. 11), which he had read throughout, in which it was stated that the depth of water in the channel of the canal was "at mean low water, 25 feet" and acting upon such informa-

tion he determined to accede to the request of the respondent and allow his vessel to pass through the canal to the eastward with a cargo of coal on this occasion. Accordingly, on the morning of December 13, 1916, when proceeding from Newport News, Virginia, to Weymouth, Massachusetts, the steamer Bay Port proceeded to the western or Buzzards Bay entrance of the Cape Cod Canal and anchored off Wings Neck, signaled for a tug and a pilot and waited for them and for permission to pass through said canal. Word was telephoned from the Wings Neck office of the respondent company to its superintendent at Buzzards Bay, and on his orders the tug Daltelline with Captain Rochester, a canal pilot, on board, was sent to take the Bay Port through the canal, and after some delay due to the passage of another vessel to the westward through the canal, signal was set under the orders of the canal superintendent to allow the Bay Port to proceed. The superintendent knew the vessel, her type and draft, at the time he gave these orders. The tug arrived at the Bay Port, put out a hawser, the pilot boarded the Bay Port, gave orders to start her engines, and the tug with the Bay Port in tow using also her own steam and in charge of the pilot, proceeded on her voyage through the canal. The Bay Port then drew 17 feet 8 inches forward and 18 feet 2 inches aft.

The Bay Port was handled strictly in accordance with the orders of the pilot, and no contention has been made by the respondents that she was handled improperly.

At about 2.15 P. M. when the steamer in tow as aforesaid had covered without any difficulty about half the voyage through the canal, she took a slight sheer to port followed by a sharp sheer to starboard, and struck the southerly bank of the canal, knocking a hole in her bottom and sustaining other damage not definitely ascertained. The T. A. Scott Company, Inc., a competent

wrecking company, was sent for at once, and its superintendent, Captain Joseph Lewis, arrived that evening and took charge of the operation of relieving the vessel from her stranded position. A conference was held between Captain Joseph Lewis, the superintendent of the T. A. Scott Company, Captain W. H. Hammett, master of the ship, and Captain William T. Lewis, the canal pilot, that evening, and it was deemed advisable by all to get the vessel off and take her through the canal to the Sandwich end as quickly as possible. Captain Geer, the superintendent of the respondent, was of the same opinion and gave orders to have this done, presumably under authority reserved by the respondent in its regulations to superintend the salvaging of vessels in its canal (Petitioner's Exhibit 11, p. 13, § 12). At about 10.15 A. M. December 14, while preliminary steps were being taken looking to the floating of the steamer, and a wrecking lighter which had been brought from Boston was commencing to try out its apparatus, the steamer unexpectedly slid off into the deep water of the canal and started to drift to the eastward with the three to three and a half knots current, being, by reason of her wet cargo and water in her hold, down by the head and having a slight list to port. Captain Joseph Lewis, who was on the lighter, called out to Captain William Lewis, the canal pilot, who was on board the steamer, that she was off and it was "up to him". Captain William Lewis, the canal pilot, replied "all right", took the wheel, ordered the captain of the steamer to put his engines ahead, and took general charge of the navigation of the steamer.

At the time in question there were three tugs in the vicinity; one after the Bay Port came afloat was engaged in caring for the wrecking lighter and at no time was available as an aid to the steamer; another was unable to get a line to the Bay Port before the second stranding

and in fact in the excitement struck the bank of the canal and broke her propeller. The third, however, got a line to the bow of the steamer, and in tow of this tug and under her own steam and with Captain William Lewis the canal pilot in charge, she continued on her voyage. Captain William Lewis was not only a canal pilot, but in the absence of Superintendent Geer he, Captain William Lewis, had full charge (Geer, Rec. 405, Q. 106-109).

After the steamer had proceeded about a mile she again lost her equilibrium, and after taking a slight sheer to starboard sheered heavily to port and struck the northern bank of the canal, sustaining damage which caused her shortly thereafter to sink and become with her cargo a total loss.

At this time there existed in the channel of the canal two shoal places over which there were only from 18 to 19 feet of water at mean low water, and it was at the time or shortly after passing over each of these shoal places that the steamer lost her equilibrium and sheered and struck the bank as hereinbefore described. The existence of these shoal places were unknown to the petitioner, but admittedly existed with the full knowledge of the respondent.

In addition to these shoal places the respondent had left on the north bank of the canal, at a place where in the construction of the canal a dam had been built, a projection in the canal forming a knuckle, the effect of which was to deflect the current toward the southerly bank of the canal. This knuckle was only a short distance to the eastward of where the steamer first sheered into the southern bank. Further, the bottom of the canal in that location, which is composed of boulders and sand, had been left in a jagged condition, causing swirls and cross currents.

The petitioner claims that the respondent is liable for the entire loss.

The learned Judge of the District Court held that the respondent was not liable for any loss.

The learned Judges of the Circuit Court of Appeals have held both the respondent and the petitioner at fault for allowing the Bay Port to enter and navigate in the canal, but have declined to follow the well recognized admiralty rule of dividing the damages, and have held that neither the petitioner, the respondent, nor the Northern Coal Company, owner of the cargo, could recover for the damages caused by the first stranding.

The learned Judge of the District Court found the second stranding inevitable and held no party at fault.

The learned Judges of the Circuit Court of Appeals have also absolved the respondent from fault for the second stranding, but have found that the master of the steamer was negligent in allowing his vessel to continue through the canal and for not taking over the charge of the vessel from the canal pilot, holding her by the three tugs in the canal (although only one tug was available) and tying her up to dolphins (of the existence of which he was ignorant) until her cargo could be readjusted and her trim changed, and for this negligence have held the petitioner at fault.

The petitioner seeks relief by Writ of Certiorari by reason of the following errors of the Circuit Court of Appeals:—

1. In finding that the petitioner was at fault in allowing its vessel to enter the canal.
2. In holding, after finding the petitioner at fault in allowing its vessel to enter the canal and the respondent likewise at fault, *that neither the petitioner nor the respondent nor the cargo owner is entitled to recover.*
3. In not ruling as a matter of law that the two shoal spots over which the steamer passed just prior to both

strandings were the proximate causes of the two strandings.

4. In not ruling as a matter of law that the first stranding was the proximate cause of the second stranding.

5. In not ruling as a matter of law that, inasmuch as the respondent admitted that the canal did not have the required statutory depth of water upon either of the shoal spots over which the steamer had passed just prior to each stranding, the burden was upon the respondent to prove not only that each stranding was not caused by such shoal spots, or either of them, but that they could not have been so caused.

6. In holding the petitioner at fault for the act of the master of the Bay Port in allowing his steamer to proceed through the canal after she came afloat when the canal superintendent, acting under the canal regulations, had ordered the vessel through to the Sandwich end.

7. In not ruling as a matter of law that if the captain of the Bay Port acquiesced in the action of the canal pilot taken under order of the canal superintendent and if such acquiescence was in accordance with his best judgment, even if it proved wrong, it was an error *in extremis* for which the petitioner should not be held liable in whole or in part.

POINTS.

I. The Circuit Court of Appeals erred in finding that the petitioner was at fault for allowing its vessel to enter the canal.

The steamer Bay Port was found by the learned Judge of the District Court to be —

“ . . . a staunch vessel properly manned, supplied and equipped. No failure of her mechanism entered into either accident. She steered as well as the ordinary whaleback steamer ; but vessels of that type

do not handle as sharply, nor as well, as those of the usual deep-sea model. She was deeply laden; but not so as to interfere with her ability to manoeuvre."

Opinion, Rec. p. 23.

And again:—

"It does not appear, however, that the ability of the Bay Port to manoeuvre was inferior to the ordinary steamer of her size and type. It was a fairly common type, the characteristics of which were known to the Canal Company."

Opinion, Rec. p. 31.

The Circuit Court of Appeals, however, went further and found that—

"Any steamer of this [whaleback] type when deeply laden is very difficult to handle much more so than those of 'the usual deep-sea model', and even when properly trimmed and in tow of a tug, she is liable to sheer."

Record, p. 651.

The petitioner contends that this was a wholly unwarranted finding by the Circuit Court of Appeals not based upon the evidence. This type of a vessel, the whaleback merchantman, had been in use for a long period, had been used on the Great Lakes (Wilson, Rec. p. 192, X-Q. 113) and somewhat on the Atlantic Coast, and had been found in all respects seaworthy and manageable. The Bay Port, which was built in 1891, was of the same design on the bottom as any other coast steamer. Her spoon bow and stern made her no more likely to sheer than a straight stem boat (Hammett, Rec. p. 515, Q. 249; Reeve, Rec. p. 591, Q. 50 and 51; J. I. Kemp, Rec. p. 396, X-Q. 152-154). She had received proper United States hull and boiler inspection certificates (Drake, Rec. p. 483, Q. 6-21; Peti-

tioner's Exhibit 13); and her draft of 18 feet 2 inches aft and 17 feet 8 inches forward (Hammett, Rec. p. 505, Q. 71; Hart, Rec. p. 487, Q. 23-26; Shelton, Rec. p. 543, Q. 29-30; p. 565, X-Q. 352-355) was regarded by all the witnesses as a proper trim (Hammett, Rec. p. 505, Q. 72; p. 515, Q. 245, 249; Hart, Rec. p. 486, Q. 13-20; p. 495, X-Q. 135-150; J. W. Maker, Rec. p. 424, Q. 16-19; p. 425, Q. 34-37; p. 426, X-Q. 56-60; Dunton, Rec. p. 498, Q. 14-24; p. 500, X-Q. 53; p. 501, X-Q. 57-63; Rochester, Rec. p. 315, X-Q. 83-90).

This particular vessel had been navigated loaded in narrow channels like the Penobscot River at Bangor, Maine, the channel at Providence, R. I., and Hell Gate, New York, and no difficulty had been experienced with her steering abilities (J. W. Maker, Rec. p. 425, Q. 38-42; Dunton, Rec. p. 499, Q. 32-36; Shelton, Rec. p. 549, Q. 130-132; p. 557, X-Q. 253-254).

The only witness in the case who testified that the Bay Port would sheer in the canal was Captain Wilson, and he based his opinion on what was not a fact, that she was down by the bow (Wilson, Rec. p. 187, Q. 50-57, p. 189; Q. 65-66, p. 192, X-Q. 114-116), and he admitted that with the tug ahead, and not down by the bow, she would be safe to navigate there (Wilson, Rec. p. 188, Q. 64; p. 192, X-Q. 123-128; p. 196, X-Q. 160); he was assuming she had no balanced rudder (Wilson, Rec. p. 191, X-Q. 107-111), which was not a fact (Shelton, Rec. p. 543, Q. 32-34).

She had passed through the canal on two previous occasions bound to the westward, light, and no difficulty in her steering had been experienced, and it was not until she attempted the passage loaded on this occasion that she sheered.

In an attempt to provide business for the canal, the respondent had sent a special agent to the office of the

operators of the steamer Bay Port and attempted to persuade them to allow their vessels of the whaleback type including the steamer Bay Port to use the canal upon their trips east loaded (Ints. 81 and 82, Rec. p. 81 and Answers thereto p. 94; Morton, J., Opinion, Rec. p. 31; Geer, X-Q. 163-165, Rec. p. 410). As a result of his solicitation the matter was given consideration and the master of the Bay Port was permitted to make use of the canal, using his own judgment on the particular occasion.

Captain Hammett of the Bay Port had, on one of the previous occasions when his vessel had passed through the canal bound to the westward, been presented with a printed pamphlet containing the rules and regulations of the respondent company and entitled "General Information & Regulations" in which it was stated that the channel of the canal had a depth at mean low water of 25 feet (Petitioner's Exhibit 11; Hammett, Rec. pp. 502-503, Q. 18-24; Morton, J., Opinion, Rec. pp. 25-26; Circuit Court of Appeals Opinion, Rec. p. 648). The publication of this pamphlet was admitted by the Canal Company (Ints. Rec. p. 73 and Answers Rec. p. 89) and had been issued after having been passed upon by the Canal Board of Directors (Belmont, Rec. pp. 635-636, X-Q. 15-26).

This depth of 25 feet was required in the Act incorporating the Canal Company (Mass. Acts of 1899, Chap. 448) in which it is stated (§3): "Said canal when constructed shall have a depth of not less than 25 feet at mean low water"; and the presence of the Bay Port in the canal on this occasion was due to the statement in the pamphlet which if true would have given safe water for the navigation of the Bay Port, which drew loaded about 19 feet, and also to the personal solicitation of the special agent of the Canal Company aforesaid (Hammett, Rec. p. 504, Q. 41; p. 517, X-Q. 270-274, 280; White Oak Trans. Co., Ints. 81-82, Rec. p. 81, and Ans. Rec. p. 94; Morton,

J., Opinion, Rec. p. 31 bottom); White Oak Trans. Co. Ints. 1-9, p. 73, and Ans. Rec. p. 89).

As a matter of fact the requirement of the statute was not complied with, and the published statement was untrue.

The first shoal, as indicated by report of survey made only 23 days prior to the date of the grounding by the Bay Port (Petitioner's Exhibit 1, Rec. p. 298), shows a considerable shoal with depths of 19.3 and 19.5 feet of water at mean low water over it. The second shoal, as indicated by a similar report of survey made 25 days prior to the stranding (Petitioner's Exhibit 3, Rec. p. 300; Petitioner's Exhibit 4, Rec. p. 303) shows a depth of only 18.2 feet with a tendency toward enlargement of the shoal during the period intervening between the survey and the stranding, and it was admitted in open court by counsel for the respondent that the respondent had knowledge of the conditions in the canal as they existed on the date of the stranding (Rec. pp. 332 and 406), and it was this knowledge of the shoals that caused Captain Geer, the canal superintendent, to hesitate and take up the matter of the passage of these vessels through the canal with the officers of the company in New York at a time prior to the entrance of the Bay Port into the canal (Opinion, Rec. p. 652). His testimony on this point is as follows:—

"X-Q. 342 (by Mr. BLODGETT). Captain, you were asked in reference to the letter of March 11th, which has been offered, referring to the Lansing going through. Do you remember that in May or June after that you received information through Mr. Crocker that he had found two shoals of about 18 to 20 feet of water in depth? A. I know I did after that, yes, sir,—I don't know how long after.

X-Q. 343. And after that did you have any conver-

sation with Commodore Miller about taking these vessels through? A. Yes, sir; I even went as far as to send one of the Boston ships around the Cape when I didn't think there was water enough in the canal. She came to the canal, and I forbade her going through, and she went around the cape.

X-Q. 344. And you said in answer to a question of Mr. Pillsbury's that you later changed your mind about it? A. After I had been at the canal a short time I changed my mind about the size of the vessels, and I took it up with Commodore Miller several times and I guess the New York office has got letters and records showing I did take it up.

X-Q. 345. Did the information you received from Mr. Crocker as to this 18 or 19-foot shoal have any effect on you in changing your mind? A. Yes, sir; after he told me that, it changed my mind."

Geer, Rec. pp. 619, 620.

"X-Q. 352. 'At almost any kind of a tide?' A. They ordered me to take these ships, to have them go through; I was ordered to have those ships through; and if they were delayed, then I got a letter from the New York office about it; and if I waited for slack water to take them through, I couldn't begin to do the business that they wanted me to."

Geer, Rec. p. 620.

"X-Q. 119 (Mr. BLODGETT). Captain, had you had any talk, prior to this accident, with Commodore Miller in reference to the condition of the bottom of the canal? A. Yes, sir; a great many times.

Mr. PILLSBURY. I have already stated that we do not contend that the company did not know of the condition, so I do not think you need to go into this.

I admitted it in connection with the other witness, Dunbar.

Mr. BLODGETT. If my brother admits that it was unsafe to take this boat through, I am perfectly willing to take that admission and not ask the question.

Mr. PILLSBURY. Of course I do not admit anything of the sort. I admit that whatever the conditions were that existed, that fact or those facts were known to the Canal Company and to the officers of the company. I do not suppose the conversation that they had would prove whether it was dangerous to take a boat through or not.

X-Q. 120. Captain, after July 1st of that year, and before the accident, did you have any talks with Commodore Miller in reference to the advisability, with the canal in the condition it was, of taking through these lake-built pig barges or steamers loaded? A. Yes, sir; I told him it was not safe to take them through.

X-Q. 121. And what did he say to you? A. He says: 'You have got to take them through, because Mr. Belmont says that we have got to get the money to pay the interest on the bonds.'

X-Q. 122. And when this Bay Port came up you gave instructions to allow her to go through? A. Yes, sir.

X-Q. 123. In accordance with your conversation with Commodore Miller? A. Yes, sir."

Geer, Rec. pp. 406-407.

"X-Q. 318. What was the specific reason of your resigning from the Cape Cod Canal Company at that time? A. Well, I was hired to have full charge of that canal in taking vessels through, and my judgment was to be supreme. Well, after I had been

there a few months, it was all right. Then they commenced to put on these pig ships on to me. I kept telling them they would get into trouble if they sent those ships through. Well, they says: 'We have got to do it, we have got to have the money.'"

Geer, Rec. p. 422.

And this witness was referred to by the learned Judge of the District Court in a previous case as follows: "He impressed me as being a truthful witness." *Seaboard Transportation Company v. Boston, N. Y. & C. C. Canal Co.* (unreported, Mass. District Court files, civil No. 1506).

All the witnesses who were asked the question testified that with 25 feet of water under the Bay Port she ought to have navigated the canal safely (Wagner, Rec. p. 283, X-Q. 87-90; Lewis, Rec. p. 223, X-Q. 284; see Scott, Rec. p. 380, X-Q. 214-215; Shelton, Rec. p. 549, Q. 135; Hammett, Rec. p. 511, Q. 185-187); and it is certainly significant that, with only two shoals in the canal, this vessel should sheer into the bank within three to six of her lengths after passing each spot after traversing half of the distance of the canal in safety.

It is to be borne in mind at all times that Captain Hammett was unfamiliar with the canal, and was not a canal pilot, and at the entrance to the canal turned his vessel over to a well-known and competent canal pilot (Opinion, Rec. p. 27) and canal tug, and felt safe in assuming that they would care properly for his vessel in its passage through the canal; in fact there is no allegation in any of the pleadings of any party in the cases of fault in the navigation or handling of the vessel at any time while in the canal. Further the respondent affirmatively pleaded that all proper steps were taken to check the sheers and enable her to recover her course on both days (Respondent's libel, Rec. p. 43, middle; p. 44, bottom; Ans. Respondent Rec. p. 116, bottom, 117, top).

This answer was filed by the respondent nearly a year after the libel was filed. In admiralty cases where the pleadings may be read as admissions it is well settled that the evidence must correspond to the pleadings.

In

Barber v. Lockwood, 134 Fed. 985, 986,

the court says:—

“The parties make up their issues and must stay by them until the end . . . allusion is made to the matter now for the benefit of proctors hereafter.”

See also —

The Aurania and The Republic, 29 Fed. 98, 116;

McKinley v. Morrish, 21 How. 343;

The Yankee, 203 Fed. 73.

Wherefore the petitioner submits that, in the language of the District Court,—

“It can hardly be held to be negligent for accepting the invitation of libellant.”

(Morton, J., Opinion, Rec. p. 31, bottom.)

II. The Circuit Court of Appeals erred in not dividing damages upon finding that both parties were at fault.

After reciting the published statement by the respondent that there were 25 feet of water in its canal, the inaccuracy of this statement, the solicitation it made to have vessels of the type of the Bay Port pass loaded through its canal, and the permission which it gave to the Bay Port to pass through the canal upon this occasion upon payment of tolls, the Circuit Court of Appeals stated:—

“While we think the Bay Port was negligent in attempting to go through the canal, yet we also think the Canal Company was equally negligent in allowing

her to enter it and that the hazard of her attempted passage was assumed by the Canal Company with full knowledge of the risk. Mr. Geer, its superintendent, testified that he had remonstrated with the officers of the canal against the admission of vessels of her type, but that he had been overruled by them."

Record, p. 651.

And again : —

" Her peculiar structure and draft must have been as well known to the superintendent of the canal as to the captain of the vessel, for he testified that he saw her as she entered the canal, and the pilot who went out to her asked her captain her draft and was informed what she drew both forward and aft and must have reported to the superintendent what he was told, as the superintendent was to pass upon her admission to the canal and she could not enter the canal without his permission."

Record, p. 652.

And again : —

" While we think the Bay Port was negligent in attempting to use the canal in her deeply laden condition, we think the Canal Company was equally at fault in allowing her to use it, and that neither should recover for any damage which may have been suffered by reason of her attempt to go through in the condition in which she was when she entered it, no negligence being alleged in her navigation by the pilot or the tug boat or members of her own crew."

Record, p. 652.

And the Circuit Court of Appeals, in accordance with its findings, decreed that neither the petitioner, nor the

respondent, nor even the cargo owner could recover damages in these actions.

It is manifest upon the facts stated and the opinion and decree of the Circuit Court of Appeals that the petitioner has suffered by reason of the adoption of a rule inconsistent with well established admiralty practice.

These proceedings were instituted and prosecuted in a court of admiralty in which it is a well settled practice that in cases where both parties are at fault the total damages are divided equally between them; and the common law rule that neither can recover where both are at fault which the Circuit Court of Appeals has applied has no application.

The half damage rule may be traced at least as far back as the Laws of Oleron, Article 14 of which provides:—

“If a vessel being moar'd lying at Anchor, be struck or grappled with another vessel under sail that is not very well steer'd, whereby the vessel at anchor is prejudiced, as also wines, or other merchandize, in each of the said ships damnify'd. In this case the whole damage shall be common, and be equally divided and appriz'd half by half. . . .”

Article 27 of the Laws of Wisbuy apportion the loss as between the two ships in cases of accident.

In the Ordonnance of Louis XIV this rule was extended to cases of fault. Title 7, Sections X and XI provide:—

“X. In case of ships running aboard each other, the damage shall be equally sustained by those that have suffered and done it, whether during the course, in a road, or in a harbour.

“XI. But if the damage be occasioned by either of the masters, it shall be repaired by him.”

In its application to modern times the half damage rule

has been narrowed to cases of mutual fault, and has been for a long period in sharp distinction to the common law practice. This distinction between the two forums is summarized in —

Cayzer v. Carroa Co., 9 App. Cas. 873 :

“ The rule of common law says, as each occasioned the accident, neither shall recover at all, and it shall be just like an inevitable accident ; the loss shall lie where it falls. Admiralty says, on the contrary, if both contributed to the loss, it shall be brought into hotchpotch, and divided between the two.”

This doctrine was first adopted in the United States of America in the case of —

The Catherine, 17 How. 170,

and has been followed in numerous subsequent cases, in all of which the Supreme Court treats the law on the subject as settled.

The John Fraser, 21 How. 184.

The Union S. S. Co. v. N. Y. & Va. S. S. Co., 24 How. 307.

The Washington and The Gregory, 9 Wall. 513.

The Sapphire, 11 Wall, 164.

The Maria Martin, 12 Wall. 31.

The Alabama and The Gamecock, 92 U. S. 695.

The Atlas, 93 U. S. 302.

The North Star, 106 U. S. 17.

The Manitoba, 122 U. S. 97.

Belden v. Chase, 150 U. S. 674.

The Eugene F. Moran, 212 U. S. 466.

The expression of this rule in —

Union S. S. Co. v. N. Y. & Va. S. S. Co., *supra*,
is : —

"Clearly if both were in fault then the damage must be equally apportioned between them."

In

The North Star, supra,

which was a case of collision, the court stated the rule as follows: —

"Where both vessels are in fault they must bear the damage in equal parts, the one suffering least being decreed to pay to the other the amount necessary to make them equal, which amount of course is one-half of the difference between the respective losses sustained."

And in —

Belden v. Chase, supra,

the distinction between the admiralty and common law is stated again as follows: —

"The doctrine in admiralty of an equal division of damages in the case of a collision between two vessels when both are in fault contributing to the collision has long prevailed in England and in this country. (*The Max Morris*, 137 U. S. 1.) But at common law the general rule is that if both vessels are culpable in respect of faults operating directly and immediately to produce the collision, neither can recover damages for injuries so caused (*Atlee v. Packet Co.*, 21 Wall. 389);"

and the practice has been treated as settled in all the principal text books on the subject.

See *1 Pardessus Collection de Lois Maritime*, 334.
Cleirac U. S. et Coutume de la mer, 55.
1 Peters Admiralty Decisions, App. XXIII.
Hopkins on Average, 189.

Abbott on Shipping, Part III, Chap. 1, § 2.

Maclachlin on Merchant Shipping, 274.

Hughes on Admiralty, 276, 277.

Benedict on Admiralty, § 471.

One exception only to this general rule occurs, and that is in personal injury cases where not only is the libellant not precluded from recovery by his own contributory negligence, but the amount of the recovery is left at the sound discretion of the court unqualified by the half damage rule.

The Max Morris, 137 U. S. 1.

The Daylesford, 30 Fed. 633.

Robinson v. Navigation Co., 73 Fed. 883.

Hughes on Admiralty, pp. 192, 208.

Even in these cases, however, the application of the half damage rule to other types of cases is recognized and distinguished.

The question of the right of the court to make discretionary division of the damages came up in the United States Supreme Court in the case of

The Victory, 63 Fed. 631, 68 Fed. 395, 168 U. S. 410,

which was a collision between two English ships in Norfolk harbor in which the District Court decided the Victory alone at fault. On appeal the Circuit Court of Appeals reversed the decision of the District Court, held both at fault but the fault of the Victory to be the more flagrant of the two, and it apportioned the loss by making the owners of the Victory pay the full value of their loss and the owners of the Plymothian merely pay the deficit sufficient to satisfy the cargo owners in full. Certiorari was applied for and obtained, and the case argued in the Supreme Court, but that tribunal held the Victory alone at fault, and the question of the proper method of apportioning the damage was not determined.

If the well-settled half-damage admiralty rule is to be superseded by one allowing apportionment based upon the circumstances of the case, there will be thrown into the admiralty practice uncertainty in the application of the law and an extended increase in litigation.

As is stated by Dr. Lushington in

The Milan, Lush. 388:

"No two judges might agree as to the exact proportions to be made . . . counsel in a case could not advise with any degree of accuracy";

and the same results would be obtained as we find in those jurisdictions where in the common law courts the jury has been allowed to pass upon the comparative negligence of the parties, apportioning the damage according to the degree of fault. The uncertainties arising from this practice and the increase of litigation attendant upon such uncertainty have prevented its further spread.

In failing to apply the half damage rule, the Circuit Court of Appeals ignores a well-settled elemental principle of admiralty jurisprudence, to the detriment of the petitioner.

III. The Circuit Court of Appeals erred in not ruling that the existence of the two shoals in the canal were proximate causes of both strandings.

The liability of the Canal Company in regard to the condition of its waterway toward vessels passing through the canal is stated in

Boston, Cape Cod & New York Canal Co. v. Staples Trans. Co., 246 Fed. 549.

That was a case where the tug Watuppa, while proceeding with tow through the Cape Cod Canal, grounded upon

a shoal and sank. The rule adopted by the Circuit Court of Appeals is as follows : —

“ While not an insurer against all damage by defects or obstructions in its canal, if the canal company knew or ought to have known that such an obstruction existed therein, it is undoubtedly liable for injuries caused by its presence to vessels using the canal, as these (vessels) were, by its invitation and without warning of the danger to be apprehended from said obstruction, unless contributing fault on their part is shown.”

This rule rests *a fortiori* on the old rule which has been applied to private docks and approaches thereto where no tolls are charged.

Smith v. Burnett, 173 U. S. 430.

Union Ice Co. v. Crowell, 55 Fed. 87.

The John A. Berkman, 6 Fed. 535.

The Calvin P. Harris, 33 Fed. 295.

The Annie R. Lewis, 50 Fed. 556.

Barber v. Lockwood, 134 Fed. 985.

Hartford & N. Y. Trans. Co. v. Hughes, 125 Fed. 981.

Daly v. Quinlan, 131 Fed. 394.

It follows the old English case of

Parnaby v. Lancaster Canal Co., 11 Ad. & El. 223, 243,

and has been followed in the case of

Riddle v. Prop. of Locks & Canals on the Merrimac River, 7 Mass. 169,

in the recent case, rising out of the sinking of the collier William Chisholm in the canal, of

Seaboard Trans. Co. v. Boston, Cape Cod & New York Canal Co., unreported (Mass. Dist. Ct. Files, civil No. 1506),

and in the Watuppa case (*supra*) both in the District Court and in the Circuit Court of Appeals, and by the District Court in its opinion in the present cases.

The Act under which the respondent company was enfranchised (Mass. Acts of 1899, Chap. 488) prescribed a minimum depth of 25 feet of water at mean low water.

The Canal Company as before stated made advertisement, knowledge of which was brought to the master of the Bay Port, that there were 25 feet of water at mean low water in the canal. Up to the time of the stranding of the Bay Port, the petitioner or its agents had no knowledge whatsoever that there was any less depth of water in the canal in its navigable channel. The respondent company, however, by successive soundings throughout the canal, had been made aware of gradual shoalings in two spots. The first of these has reference to the first stranding.

There is no dispute as to the existence of this shoal. It was what was known to the Canal Company as the "graveyard" of the canal (Geer, Rec. p. 403, Q. 82). The Canal Company knew its location and condition, having only twenty-three days prior to the date of the first grounding of the Bay Port sounded that portion of the canal over which the Bay Port passed just prior to her sheer into the south bank, and the report of the survey is in evidence (Bay Port Exhibit 1, Rec. p. 298). This blueprint shows between Stations 243 and 242 depths of 19.5 and 20 feet mean low water, and in the centre line of the canal between Stations 242 and 241 a depth of 19.3 feet. The size of this shoal can be seen from the report of the digger which excavated there after the grounding. Be-

tween December 28 and January 2 the Kennebec took out from Station 242 1,350 yards (Rec. p. 537). The rise and fall of the tide at this point is 1 to 4½ feet (Crocker, Rec. p. 305, X-Q. 210-211; Dunbar, Rec. p. 330, Q. 82; White Oak Trans. Co, Int. 78, Rec. p. 81, and Ans. Rec. p. 94), and at the time the Bay Port was passing through the canal it was half tide (Tide table, Bay Port Exhibit 8; Rochester, Rec. p. 311, Q. 33, 34; Morton, J., Opinion, Rec. p. 24; Circuit Court of Appeals Opinion, Rec. p. 648). There was therefore at the time the Bay Port was passing through the canal between Stations 243 and 242, 21.75 feet of water, and between Stations 242 and 241 there was in the centre line of the canal .2 of a foot less, and in all probability still less out of the centre line of the channel. The learned Judge of the District Court found "from 21 to 22 feet" (Opinion District Court, Rec. p. 26).

A vessel of this size needs in such a narrow waterway, with uneven sides and bottom through which passes so strong a tidal current, 5 feet and more of water under her for safe navigation (Dunton, Rec. p. 499, Q. 39; J. W. Maker, Rec. p. 428, Q. 74-75; B. Kemp, Rec. p. 467, X-Q. 61-63). *Apparently no less a clearance was deemed advisable by the Canal Company, for its advertisement for vessels passing through the canal placed a maximum depth of 20 feet* (Coakley, Rec. p. 358, X-Q. 197-201; White Oak Trans. Co. Ints. 6-9, and Ans. Rec. pp. 73, 89), *while its circular of information stated that there were 25 feet at mean low water in the canal*, and vessels of deep draft were taken through on the high water or as near thereto as possible, giving an additional clearance of several feet. Captain Hammett's opinion, given after he had found out the conditions in the canal, was "from 5 feet to 10 feet, not less than 5 feet" (Hammett, Rec. p. 507, Q. 100-101). The statement of the District Court in its opinion (Morton,

J., Rec. p. 26), *on which possibly his decision on the whole case rests*, that "the evidence for the Bay Port is that, unless a vessel like her has from *three* to five feet of water under her bottom, she is likely to 'smell the ground', as it is called, which interferes with her steerage and may cause her to sheer" *seems to be incorrect*.

The Bay Port drew, when she entered the canal, 18 feet 2 inches aft and 17 feet 8 inches forward (Hammett, Rec. p. 505, Q. 71; Hart, Rec. p. 487, Q. 23-26; Shelton, Rec. p. 543, Q. 29-30; Rec. p. 565, X-Q. 352-355). There was therefore necessary at least 23.2 feet of water for her safely to pass through the canal *whereas there were nearly 1½ feet less on the shoal over which she passed just prior to the first stranding*.

It is a well-known phenomenon that when a vessel runs into shallow water she "smells the bottom" and sheers and becomes unmanageable (Reeve, Rec. p. 587, Q. 30; Wilson, Rec. pp. 193-194, X-Q. 133-134; Lecompte, Rec. p. 251, X-Q. 190-191; Dunton, Rec. p. 499, Q. 37-38; Scott, Rec. p. 380, X-Q. 214-215; Wagner, Rec. p. 284, X-Q. 94-95; Hammett, Rec. p. 507, Q. 99). This is judicially recognized.

Seaboard Trans. Co. v. Boston Cape Cod & New York Canal Co. (supra), citing *The Ralph Creyke*, 55 L. T. (N. S.) 155.

It was the opinion of all those on board the Bay Port at the time that she sheered by reason of meeting shoal ground (Rochester, Rec. p. 318, X-Q. 118; Hammett, Rec. p. 506, Q. 98-99; Shelton, Rec. p. 549, Q. 133; Rec. p. 558, X-Q. 255; L. Maker, Rec. p. 572, Q. 36). This was no doubt the opinion of Captain Lecompte of the tug (Lecompte, Rec. p. 248, X-Q. 157-158).

In the Watuppa case,

Boston, Cape Cod & New York Canal Co. v. Staples Trans Co., 246 Fed. 549,

the Canal Company was held responsible even though the shoal was unknown to any of its officers or employees, or to anyone, on the theory that it should have known of its presence. In the present case the Canal Company had charts of all the shoals material to this case on file in its office three weeks before the Bay Port applied for admission to the canal (Crocker, Rec. pp. 296-297, X-Q. 110-129). Its engineer and superintendent knew of three shoals (Crocker, Rec. pp. 295-296, X-Q. 108-109; Rec. p. 297, X-Q. 130-134). In fact proctor for the Canal Company admitted knowledge of these shoals in the canal prior to the accidents to the Bay Port, in a statement in open court (Rec. pp. 332, 406) and in Ans. to Int. 108 (Rec. pp. 88, 95); and Crocker, its engineer, admitted they existed on the day of the disaster to the Bay Port (Crocker, Rec. p. 306, X-Q. 228). Yet it did not notify vessel owners, pilots, or canal towboat masters of their existence (White Oak Trans. Co. Int. 68, and Ans. pp. 80, 93; Crocker, Rec. p. 297, X-Q. 134-136; Wagner, Rec. p. 283, X-Q. 82-87; Smith, Rec. p. 287, X-Q. 44-48; McGilvray, Rec. p. 277, X-Q. 28-31); and Superintendent Geer, having this knowledge, gave permission for the Bay Port to enter the canal, and chose under instructions from the officers of the company in New York a time for her passage, though not the most favorable, so as not to interfere with the profitable business of the New York boats (Geer, Rec. pp. 409-410, X-Q. 155-162; Rec. p. 621, X-Q. 355), and as before stated the admission of this vessel was made by orders from the office of the respondent company in New York under protest of the superintendent of the Canal Company (Geer, Rec. pp. 406-407, X-Q. 119-123; p. 422, X-Q. 318; p. 619, X-Q. 342-345; p. 620, X-Q. 352).

The respondent company therefore frankly solicited this vessel to use the canal, having full knowledge of its

dangers, and permitted it to enter at a time when shoals of 22 feet and under existed though safe navigation necessitated a depth of an additional foot and a half of water.

Furthermore, the allowing of this shoal to exist was a direct violation of the statutory requirement under which the canal was constructed and operated, and the burden is immediately imposed upon the Canal Company to prove not only that this violation did not cause or contribute to the accident, but that it could not have done so.

The Pennsylvania, 19 Wall. 125.

The Selje, 243 U. S. 291.

The Thielbek, 241 Fed. 209, 216.

The Ellis, 152 Fed. 981.

The Dauntless, 121 Fed. 420.

This principle of admiralty practice has been entirely ignored by both the learned courts.

The District Court found, and the Circuit Court of Appeals approved of the finding, that the vessel passed 1,000 feet beyond this shoal before striking the bank, and held, therefore, that the shoal was not a proximate cause of the stranding; and the District Court suggested as an intervening cause:

“ Her speed was not slowed, nor was the tug called upon for help. The causes of the stranding seem to have been the large amount of port helm which, by the pilot's orders, had been given the steamer to bring her away from the bank, the suddenness with which she finally minded her helm and the unexpectedly large swing which she took, the general current and cross-current in the canal, all of which acting together made it impossible to control her in time to prevent her from striking.”

Morton, J., Opinion, Rec. p. 27.

This was an absolutely independent idea of the District Court, not based upon any testimony in the case, nor covered by any pleadings or allegations of fault. *In fact the Canal Company affirmatively pleaded, and has always maintained, that the vessel had become unmanageable and all proper steps were taken to check the sheers and enable her to recover her course on both days (Libel of Canal Co. v. White Oak Trans. Co., Rec. p. 43, middle, p. 44, bottom; Ans. of Canal Co. to libel of White Oak Trans. Co., Rec. p. 116, bottom, 117, bottom).*

The steamer Bay Port was 265 feet in length. It is common knowledge that anything which disturbs the equilibrium of a vessel takes her out of control until this equilibrium is regained. It is similar to a runner in a race losing his stride and regaining it. The final effect of the shoal upon the steamer would naturally occur as her stern left the shoal. At this time her stem would be 265 feet in advance. She also naturally would begin to sheer before she struck the bank, and the courts have found that she struck the bank about 1,000 feet from the shoal. The petitioner therefore respectfully submits that it is a natural and probable consequence that this vessel, having "smelled bottom" in passing over the shoal, and having become thereby in unstable equilibrium, would sheer and strike the bank three of her lengths beyond the shoal, and that the intervening causes suggested by the District Court and no one else, are not sufficient to break this train of causation initiated by the shoal spots, and are not properly before the court under the pleadings and evidence. *Certainly it cannot be held that the shoal spot not only did not but could not have caused the first stranding.*

The second shoal likewise was the proximate cause of the second stranding. Almost immediately after the Bay Port grounded her master notified her operating agents in Boston, who lost no time in communicating with The

Scott Wrecking Company, Inc., and its wreck-master. Captain Joseph Lewis took the train from Boston for Buzzards Bay two hours after the accident occurred (Geer, Rec. p. 403, Q. 93; Respondent's Exhibit 16, Rec. p. 588; Morton, J., Opinion, Rec. p. 27, bottom), and upon his arrival immediately took charge of the salvage of the steamer. In fact no contention is made that the owner of the Bay Port did not seasonably and properly take steps toward the protection of the steamer Bay Port in her stranded position.

This shoal, like the one in connection with the first stranding, had been known to the Canal Company as early as June 13, 1916, and was sounded and plotted on its charts (Petitioner's Exhibit 3, Rec. p. 300). This blueprint shows a shoal between Stations 195 and 192. Between Stations 193 and 192 there is a depth of 20 feet, and between stations 194 and 193 a depth of 18.2 feet, and in many places less than 20 feet mean low water are shown.

Soundings were again taken August 17, 1916, as shown on said exhibit. Between these two soundings of June 13, and August 17, 1916, there had taken place perceptible changes in the bottom, with a tendency toward enlargement of the shoal (Crocker, Rec. p. 300, X-Q. 165-169). Again, on November 18, further soundings were taken (Petitioner's Exhibit 4, Rec. p. 303). This indicated a further lengthening of the shoal extending to the eastward beyond Station 191, where 20.7 feet are shown, and between Stations 193 and 192, 18.2 feet is the depth for at least one half of the 100-foot line. The presumption is that this shoal had further grown in the month preceding the grounding of the Bay Port. Although the learned Judge of the District Court has found a depth over this second shoal at mean low water of 20 feet (Morton, Opinion, Rec. p. 31 top) this is not to be wondered at consider-

ing the maze of soundings upon the blueprints. But the blueprints are the product of the respondent; they are admittedly correct; depths of less than 20 feet are clearly indicated upon them; and the finding of the District Court is, therefore, without doubt an error. It was clearly negligent on the part of the Canal Company to allow these shoals to make up.

Otis v. I. M. Luddington's Sons, Inc., 229 Fed. 454.

Garfield & Proctor Coal Co. v. Rockland-Rockport Lime Co., 184 Mass. 60.

Nickerson v. Tirrell, 127 Mass. 236.

Commodore Miller, the vice-president of the Canal Company, had talked over this shoal with Mr. Crocker. The same attitude was shown with reference to it as the one at Station 241, and the people using the canal were not notified, but were left to believe that there were in all parts of the 100-foot channel of the canal 25 feet of water (Crocker, Rec. pp. 301-302, X-Q. 181-186).

The Bay Port when she came off from her first position was down by the bow at least a foot, and with a list to port (Lewis, Rec. p. 205, Q. 67; Hammett, Rec. p. 510, Q. 169; Hart, Rec. p. 491, Q. 84-89; Shelton, Rec. p. 547, Q. 98; Myers, Rec. p. 261, Q. 31; Smith, Rec. p. 286, Q. 28-29; Donnelly, Rec. p. 274, X-Q. 117; Brennan, Rec. p. 473, X-Q. 79, 90-99; Morton, J., Opinion, Rec. p. 28; Opinion Circuit Court of Appeals, Rec. p. 649), due to her cargo being wet and her having more or less water in her hold forward.

This accounts for her being logy and somewhat harder to handle, as was testified to (Scott, Rec. p. 379, X-Q. 203-205; B. Kemp, Rec. p. 464, X-Q. 39). Her draft therefore would be approximately 19 feet, which was under the maximum depth of 20 feet allowed in the canal (Coakley, Rec. p. 358, X-Q. 197-201; White Oak Trans. Co. Ints. 6-9 and Ans. Rec. pp. 73, 89).

The tide in the canal was at about the same height as at the time of the first stranding but was running in the opposite direction (Opinion District Court, Rec. p. 27, bottom; Opinion Circuit Court of Appeals, Rec. p. 649; Petitioner's Exhibit 8). *There was therefore over this second shoal at the time approximately 20.7 feet, whereas the Bay Port would require, as heretofore pointed out, approximately 24 feet for safe navigation.* The finding by the learned Judge of the District Court that this shoal had 23 feet of water over it is not in accordance with the facts. As before shown, the District Court used as a basis of its reckoning a depth of 20 feet instead of 18.2 feet, and though finding it was half tide (Opinion District Court, Rec. p. 31) added 3 feet when the total rise of the tide is only 4 to 4½ feet (Crocker Rec. p. 305, X-Q. 210-211; Dunbar, Rec. p. 330, Q. 82; Petitioner's Int. 78, Rec. p. 81 and Ans. Rec. p. 94). Even with this finding of the District Court that there were 23 feet of water over the shoal, there was 1 foot lacking for safe navigation of the vessel. The Bay Port was proceeding through the canal with an easterly current of about 3 to 3½ knots under tow of a tugboat, and under her own steam, making about 6 knots over the bottom (Hart, Rec. p. 491, Q. 93-97; Hammett, Rec. p. 530, X-Q. 437-438, 442; L. Maker, Rec. p. 574, Q. 73-82). She proceeded without appreciable difficulty for about a mile in the canal until shortly after reaching this second shoal spot (Opinion Circuit Court of Appeals, Rec. p. 651). The Circuit Court of Appeals assuming to reiterate the finding of the District Court states that the Bay Port stranded about 2,000 feet beyond this shoal (Opinion Circuit Court of Appeals, Rec. p. 651). As a matter of fact, this is greater than the evidence warrants.

According to the answers by the Canal Company to interrogatories it was 11,150 feet from the Bourne High-

way Bridge to where she struck the first time. This is stated by all witnesses to have been at Station 230. The distance from the Bourne Highway Bridge to where she struck the second day is 16,350 feet, or 52 stations beyond Station 230, *i. e.*, Station 178 (Ans. to Ints., White Oak Trans. Co., 61-63, 105, pp. 79, 83, 93, 95; Crocker, Rec. p. 298, X-Q. 140-141). These answers were made by the respondent, presumably from information obtained from its own engineering department.

The shoal as before shown began at Station 192. Her stern, therefore, left the shoal at approximately 1,400 feet, or about five of her lengths, and not 2,000 feet from the point where she struck the bank. An explanation of this error is the apparent misinterpretation of the language of the District Court. The latter stated: "About 2000 feet west of where the Bay Port *finally landed* she passed over a shallow spot much like that above described in connection with the first stranding" (Morton, Opinion, Rec. p. 30, bottom). The Circuit Court of Appeals says: "The learned Judge of the District Court has found that . . . as she had passed the shoal before the first stranding by about 1000 feet and by about 2000 feet before the second, etc." (Rec. p. 65), and approves of this assumed finding. As a matter of fact the Bay Port *finally landed* not where she struck the bank, which was on the northerly side, but drifted off and finally struck and sank several lengths beyond and on the southerly side of the canal (see Petitioner's Exhibit 14). Deducting from the 2000 feet the distance from where she struck to where she finally landed and we have a distance giving approximate substantiation to the answers of the respondent to the petitioner's interrogatories. As further evidence of the correctness of this figure Captain Hammett estimates that she went three or four times her length after the sheer to the north bank began before she struck (Hammett, Rec.

p. 534, X-Q. 486-494); and Shelton is of the same opinion (Shelton, Rec. p. 562, X-Q. 312-313).

All the navigators who testified upon the point stated that the Bay Port sheered because of running into shoal water. Hart, the second officer of the Bay Port, testified as follows: —

“ Q. 98. Can you give us any reason why your vessel sheered at that time? A. Well, I don't know the reason; no, sir; but I can give you my opinion.

Q. 99. Well, what is your opinion as to why she sheered?

Mr. PILLSBURY. I don't think he can do that.

The COURT. Yes, he may answer.

A. Well, I should say, it being a narrow channel,— the canal,— and the ship drawing the depth of water she did, and being near the bottom, caused her to sheer.”

Hart, Rec. p. 492.

And again: —

“ X-Q. 128. Perhaps I did not make myself clear. Mr. Blodgett asked you what your opinion was as to the cause of that sheer that she took the second day.

A. Yes, sir.

X-Q. 129. Do you remember that? A. Yes.

X-Q. 130. Now, in answering that question did you assume that the water was shallow at that point that she took that sheer? A. He asked me my opinion, and I told him I thought on account of being shallow water she took the sheer; yes, sir.

X-Q. 131. If, as a matter of fact, it was not shallow water where she took the sheer, what would be your opinion as to the cause of the sheer? A. I don't understand you. You mean if there is plenty of water under the ship?

X-Q. 132. Yes. A. She wouldn't have took the sheer."

Hart, Rec. pp. 494, 495.

Shelton, the first officer, says :—

" Q. 134. And in your judgment, what caused her to sheer on the second day? A. Shoal water.

Q. 135. If there had been 25 feet mean depth of water, in your judgment would either accident have happened? A. I don't think so."

Shelton, Rec. p. 549.

And again: —

" X-Q. 191. You said in answer to Mr. Blodgett that you thought the cause of her sheering both the first day and the second day, and all the sheers that she took was shoal water? A. It seems that way, sir, the way the ship took the sheer.

X-Q. 192. You do not know of your own knowledge that there was shoal water there, do you? A. No, sir; I couldn't say; I didn't sound it.

X-Q. 193. Now, let me assume, Mr. Shelton, simply for the sake of argument, that there was no shoal water when she sheered, that she had plenty of water underneath her; what would you say was the cause of the sheer? A. I should say she never would have sheered, sir, if there was not shoal water.

X-Q. 194. You cannot conceive of her sheering for any other reason? A. No other reason, unless there is shoal water or current; I couldn't say which."

Shelton, Rec. p. 553.

The testimony of the helmsman was : —

" Q. 92. Could you see anything that caused your vessel to sheer on this second day? A. I couldn't see

anything, sir, but imagined it was shoal water or something of that kind."

L. Maker, Rec. p. 575.

Captain Hammett of the Bay Port is of the same opinion:—

"Q. 181. And then her stern came out and she sank? A. Swung against the south bank and sunk.

Q. 182. What, in your opinion, was the reason for her sheering to starboard and port, towards the south bank and north bank on that occasion?

Mr. PILLSBURY. The same objection that I made to the other.

A. Shoal water; that is the only thing that I could tell."

Hammett, Rec. p. 511.

Thus all the officers of the Bay Port, who are more competent to testify on this point than persons off the ship,

The Natchez, 78 Fed. 183;

Tow Boat No. 1, 74 Fed. 906;

The Sam Sloan, 65 Fed. 125;

unite in the belief that shoal water was the cause of this sheering.

Professor Reeve testified from the point of view of a hydraulic engineer:—

"Q. 47. And have you examined the shoal spots further down? A. I have examined the soundings.

Q. 48. Have you examined the soundings? A. Yes, sir.

Q. 49. And if the shoal spot at 241 to 243 was sufficient to cause such an effect, the other would be at least as bad, wouldn't it? A. Yes; the situations are about equal. The second shoal spot is more shoal

than the first, but is somewhat wider. On the other hand, it was also somewhat restricted by the barge Trilby. The situation was also accentuated the second day by the greater draft of the ship, being down by the head."

Reeve, Rec. p. 591.

An illustration of the theory that the Bay Port passed over the shoal and thereby became in unstable equilibrium and thereafter remained in spite of the efforts to bring her back is the testimony of the first officer of the Bay Port, who testified as follows:—

"X-Q. 277. Now, Mr. Shelton, I will direct your attention to the second day. You stated in the log, in giving the account of the accident the second day, that the ship would not answer her helm, did you not? A. Yes, sir.

X-Q. 278. Is that a fact? A. Yes, sir.

X-Q. 279. Now, at what point was she when she would not answer her helm, in relation to where she struck? A. Well, I should say from the ferry until the time she struck,—until they broke that sheer to the south and started for the north shore.

X-Q. 280. Through all that period she would not answer her helm? A. No, sir.

X-Q. 281. If there were deep water in any of that portion of the canal where she would not answer her helm, how do you account for her not answering her helm? A. The only way I can account is shoal water; she won't answer—

X-Q. 282. But you don't know there was shoal water? A. No.

X-Q. 283. I say, assuming there was not any shoal water, or assuming there was deep water in certain portions of it, how do you account for her not

answering her helm in deep water? *A. I don't think she had room enough, sir, after she got out of shoal water, to answer her helm.*

X-Q. 284. Did she answer her helm at any point in that time there? *A. No, sir; not from then.*

X-Q. 285. She did not answer her helm? *A. Not from the ferry. I stated in the log-book she wouldn't answer her helm."*

Shelton, Rec. pp. 559-560.

And further:—

"X-Q. 290. Where did you understand the ship was when she didn't answer her helm? A. From the time she sheered from the south shore, sir, until she went ashore on the other side."

Shelton, Rec. p. 560.

The reason the Bay Port proceeded farther on the second day than on the first was that she was proceeding with a fair tide twice as fast over the bottom, *i. e.*, six knots equals 528 feet per minute, or her length in half a minute, and in sheering she would cover a greater distance on the bottom. Naturally, therefore, this steamer would be expected to strike the bank at approximately the place where she did. If she was less manageable on this second occasion, the responsibility therefor rests with the respondent for allowing the vessel in the canal when the shoal spots existed. *Certainly it cannot be said that the second shoal spot could not have caused the accident.*

We submit, therefore, that the only fair and proper conclusion on all the evidence is to consider both these shoal spots as the approximate causes of the strandings, and in any event the respondent has failed to prove that the shoal spots not only did not but could not have caused both strandings and the resulting damage.

IV. The Circuit Court of Appeals erred in not ruling as a matter of law that the first stranding was the proximate cause of the second stranding.

The Circuit Court of Appeals has found in connection with the first stranding that both the petitioner and the respondent were at fault for the identical reason of allowing the steamer Bay Port to enter the canal.

The petitioner seasonably and promptly took steps for the relief of the vessel in her stranded position, and no contention otherwise appears in the case, and the salvor who had charge of the vessel up to the time she came afloat has been absolved from all blame by both courts. If, therefore, no intervening cause appeared from the time she came afloat until the second stranding occurred, the fault of the respondent in the first stranding continued to the second stranding.

The District Court has held that the second accident was inevitable, and that Captain Hammett of the Bay Port was in no way to blame in connection with the handling of the vessel from the time she came afloat until the second stranding.

The Circuit Court of Appeals, however, found that the master of the Bay Port was negligent in not making use of the three tugs to hold his vessel in the canal in the swift current, tie her up to dolphins and readjust her cargo and trim, and these acts of omission are imputed to the petitioner, and are apparently held the sole proximate cause of the second stranding, for the Circuit Court of Appeals exonerates the respondent on the ground that it did not assent to the Bay Port being in the canal in the trim in which she was when she came afloat.

The Circuit Court of Appeals based its decision on replies to theoretical questions to the effect that the three tugs could have held this vessel in the current of

the canal after she came afloat. *As a matter of fact, at no time were three tugs available, or even two tugs.*

When the Bay Port heading eastward so unexpectedly slid off the bank, the wrecking lighter Salvor was alongside with three tugs, the Dalzelline, Hazelton and John C. Stuart, headed to the westward (Wagner, Rec. p. 282, X-Q. 58-67; Opinion Circuit Court of Appeals, Rec. p. 649). One of these tugs, the John C. Stuart, was immediately ordered to take care of the wrecking lighter to prevent her from going ashore. This was done; the lighter being towed to the westward (A. Smith, Rec. p. 286, Q. 27), and at no time was this tug able to do anything else. The second tug, the Hazelton, had also at first gone to the aid of the wrecking lighter but changed to help the Bay Port and, being a slow handling boat, damaged her propeller in contact with the bank of the canal, and at no time was she able to get a line on the Bay Port prior to the second stranding (Wagner, Rec. p. 280, Q. 31-37, 41-42, 51). The Dalzelline took a line from the bow of the Bay Port and proceeded through the canal as on the previous day. No one testified that one or even two tugs would have held the Bay Port in the trim in which she was in the swift current of this narrow waterway.

The dolphins referred to by the Circuit Court of Appeals were situated about 1,000 feet from where the Bay Port was first ashore (Circuit Court of Appeals Opinion, Rec. p. 653), and the Bay Port drifted by them in a few minutes after she floated. It was of course not anticipated that she would come off so unexpectedly and drift along through the canal, and no one had thought of tying up to these dolphins; in fact it had been the common opinion of the master of the Bay Port, the canal pilot and the salvor that the steamer should be taken through to the eastern end as soon as possible (Morton, Opinion, Rec. p. 29, top; Hammett, Rec. p. 528, X-Q. 408-415; 422-423). In fact as

the Bay Port went adrift pilot Lewis and salvor Lewis agreed, in so far as they could in the excitement, that the boat should be taken to the Sandwich end (Wagner, Rec. p. 281, Q. 53; p. 282, X-Q. 71-72), and this was the order of the canal superintendent (Geer, Rec. pp. 405-406, Q. 112-114; p. 408, X-Q. 146) given under authority reserved in the regulations of the Canal Company with reference to the salvaging of vessels in the canal (Petitioner's Exhibit 11, p. 13, § 12), and the District Court has found:—

“It does not appear that Captain Hammett knew about the dolphins before reaching them, and he testified that even now he could not say whether it would have been safe to tie the Bay Port to them or not, a statement which I believe.”

Morton, J., Opinion, Rec. p. 33.

The suggestion of readjusting the cargo of the vessel initiated in the minds of the Circuit Court of Appeals. None of the many marine experts in the case testified that this could be done, and the impracticability of it can be seen from the fact that it would have necessitated derrick lighters, booms, scows and hoisting machinery, of which there were none of sufficient capacity available in the canal, and even if the vessel were lightered forward the water in her cargo would have worked aft and put her down at the stern to an extent such that it would have been necessary to have reloaded the forward end to have brought her again on a comparatively even keel.

This finding by the Circuit Court of Appeals that Captain Hammett was negligent is not only not based upon any pleading in the case but is directly contra to the affirmative pleading of the respondent as before shown (*Libel of Canal Co. v. White Oak Trans. Co.*, Rec. p. 43,

middle, p. 44, bottom; Answer of Canal Co. to libel of White Oak Trans. Co., Rec. p. 116, bottom, 117 bottom).

The condition of the steamer as to trim and manageability when she slid off from her first position aground was the result in part of the wrongful act of the respondent. If the canal had been dredged to a depth of 25 feet in accordance with the statutory requirement, all the witnesses who testified upon this point stated that the Bay Port would have gone through without difficulty (Wagner, Rec. p. 283, X-Q. 87-90; Lewis, Rec. p. 223, X-Q. 284; see Scott, Rec. p. 380, X-Q. 214-215; Shelton, Rec. p. 549, Q. 135; Hammett, Rec. p. 511, Q. 185-187).

Moreover as the burden is upon the respondent under

The Pennsylvania, supra,

to prove that the second shoal could not have caused the second stranding, unless Captain Hammett was at fault for not taking command of his vessel away from the canal pilot and performing the acts suggested by the Circuit Court of Appeals contrary to the order of the canal superintendent, then there has been no intervening contributing cause, and the first stranding was clearly a proximate cause of the second stranding.

The British Isles, 264 Fed. 318.

In that case a vessel was at fault for anchoring improperly, and the court held that a hurricane which caused the vessel to drag her anchor was not such an intervening cause as would excuse the wrongful act of the vessel in first anchoring in an improper place. In the present case the petitioner respectfully submits that the wrongful act of the respondent in the first stranding as found by the Circuit Court of Appeals continued to be the sole and proximate cause of the second stranding.

V. *The Circuit Court of Appeals erred in not ruling as a matter of law that the burden was upon the respondent to prove not only that the strandings were not caused by the shoal spots but that they could not have been so caused.*

The Act under which the Canal Company was incorporated (Mass. Acts of 1899, c. 488, § 3) prescribed that "said canal when constructed shall have a depth of not less than 25 feet at mean low water". At the time of the strandings the canal had been constructed and was open to navigation, and also as before stated, the respondent had made advertisement which had been brought to the attention of the master of the Bay Port that the canal at this time contained in its navigable channel 25 feet of water at mean low water (Petitioner's Exhibit 11, p. 3). It is admitted that over these two shoal spots there were respectively not over 19.3 and 18.2 feet of water at mean low water, and all the witnesses who testified upon this point stated that with 25 feet of water at mean low water in the canal at the time of the attempted passage of the Bay Port, she would not have sheered into the bank (Wagner, Rec. p. 283, X-Q. 87-90; Lewis, Rec. p. 223, X-Q. 284; Shelton, Rec. p. 549, Q. 135; Scott, Rec. p. 380, X-Q. 214-215; Hammett, Rec. p. 511, Q. 185-187).

The petitioner requested both courts in its arguments and briefs to apply the rule on burden of proof as expressed in

The Pennsylvania, supra, and

hold that there was upon the respondent the duty to prove that the two shoals not only did not but could not have caused or contributed to the strandings; both courts have refused to apply this principle. This rule as stated in

The Pennsylvania, supra.

has been approved by this court recently in the case of

The Selje, 243 U. S. 291,

and has been followed by the lower courts,

The Theilick, 241 Fed. 209, 216;

The Ellis, 152 Fed. 891;

The Dauntless, 121 Fed. 439;

wherever there has been a positive breach of a statutory duty. This rule is applicable to the circumstances of the present case, and if applied would raise a presumption against the respondent which the facts of the case cannot overthrow.

We therefore submit that both the District Court and the Circuit Court of Appeals erred in failing to follow and apply this well settled rule of law as adopted by this court.

VI. *The Circuit Court of Appeals erred in holding the petitioner at fault for the act of the master of the Bay Port in allowing his steamer after she came astern to proceed through the canal, though under the orders of the canal superintendent.*

The attempted passage of the steamer Bay Port through the canal was by virtue of a contract for hire, the terms of which were in part stated in the regulations of the respondent entitled "General Information and Regulations" (Petitioner's Exhibit No. 11) which pamphlet had been read by Captain Hammett of the Bay Port on a previous trip through the canal. This pamphlet prescribes (page 13, § 12):—

"In the event of grounding the canal authorities shall have the right to direct all operations for float-

ing the vessel." (Opinion Circuit Court of Appeals, Rec. p. 649.)

Under the authority of this provision Superintendent Geer of the Canal Company ordered the Bay Port to be taken out of the canal as soon as possible to the eastern or Sandwich Bay end. His testimony on this point is as follows:—

"Q. 112. I understood you to say that on the afternoon of the 13th, when the three tugs were trying to get her off, you gave instructions that if she came off into the canal they were to get her in the channel and get her out of the canal as soon as they could? A. Get her out of the canal as soon as possible.

Q. 113. At that time you did not know how serious the leak was or what the damaged condition was on her starboard side at all? A. No, sir.

Q. 114. And you did that before any examination had been made to see the extent of her damage? A. Yes, sir."

Geer, Rec. pp. 405-406.

"X-Q. 146. You say that you gave orders to get her out as quick as possible, out of the canal? A. Yes, sir; that first night she went ashore."

Geer, Rec. p. 408.

Captain Geer had had the experience of having the canal blocked when the tug Watuppa and the collier William Chisholm grounded and sank in the canal, and as a burned child dreads the fire, he was undoubtedly influenced by these previous disasters in issuing the order that the boat be taken as quickly as possible out of the canal.

Although the District Court has found no fault on the part of the master of the Bay Port in proceeding through the canal after she came afloat, and it was the common

opinion of all the experts that this was the proper thing to do, the Circuit Court of Appeals has determined that Captain Hammett was in error as before stated in not taking his vessel out of the hands of the canal pilot — inexperienced as he was in the canal—and using the tugs, tying her up to the dolphins and readjusting her cargo, although these acts were contrary to the orders received from the canal superintendent and therefore would have constituted a breach of the contract of passage of the Bay Port through the canal. The petitioner therefore submits that aside from the question of expediency in holding the vessel in the canal, her master was under a duty to perform the terms of his contract in so far as it was reasonably possible and allow his vessel to be taken as quickly as possible to the eastern end of the canal in compliance with the orders of the canal superintendent. At the most, compliance with this order in the emergency of this case, if error at all, was an error of judgment not imputable to the petitioner (Kemp, Rec. p. 388, X-Q. 74).

The Star of Hope, 9 Wall. 203, 230-231.

The E. V. McCauley, 189 Fed. 827.

The Hercules, 73 Fed. 255.

The Garden City, 127 Fed. 298.

The Parker, 28 Fed. 156.

VII. The Circuit Court of Appeals in holding the petitioner at fault for the second stranding erred in not applying the in extremis rule.

The steamer Bay Port had grounded first at 2.15 P.M. She had been turned over to an experienced and competent salvage company, who had promptly taken charge of the salvage operation through a skilled superintendent who had engaged the services of three steam tugs and had had the company's wrecking lighter with salvage crew sent

down from Boston, Massachusetts. It was not anticipated by anyone that the vessel would float till near noon. At about 10.15 A.M., however, the vessel without warning relieved herself from her stranded position and floated off with the current. The situation and the manner in which it was met is stated by the District Court as follows:—

“The sudden and unexpected floating of the steamer and her being caught by the current in the narrow channel created a serious emergency. Captain Joseph Lewis, who was at the time on the lighter *Salvor*, alongside the Bay Port, called to pilot Lewis on the steamer's bridge, ‘She is yours’, or words to that effect,—to which pilot Lewis assented. From that time until after the accident, the Scott Company, as before stated, had nothing more to do with the steamer and exercised no control over her. Pilot Lewis assumed command of her. By his orders, one of the tugs (the *Dalzelline*) took a short hawser ahead; another pushed the steamer's stern straight with the canal and then took away the lighter; the third tug, apparently without orders, swung out into the current, and started after the steamer with the idea of getting a line on her stern. The order was given to start the steamer's engines full speed ahead, in order to obtain steerage-way. Meanwhile the Bay Port was drifting along the canal, going in this manner perhaps a third of a mile. Then by the action of her own engines and of the tug ahead she obtained steerage-way through the water and took on a speed over the ground of about six miles per hour.

“Some dolphins where she might have been tied up were passed without any effort to place her there. Shortly afterward, the tug *Hazelton* came up behind the Bay Port and offered a line to her quarter. The

men on the Bay Port were so much occupied that nobody took it."

Morton, J., Opinion, Rec. p. 30.

The Circuit Court of Appeals likewise states: "*unexpectedly* about 10.15 A. M., she slid off the bank into the channel of the canal" (Circuit Court of Appeals Opinion, Rec. p. 649).

The Pilot Lewis referred to in the District Court's opinion is the canal pilot. He is described by the District Court as "a canal pilot of recognized ability" (Opinion, Rec. p. 27). His connection with the navigation of the Bay Port is described by the superintendent of the Canal Company as follows: —

"Q. 106. When she came off the bank, with the hole on her starboard side plugged up and her own pumps having control of her, pilot Lewis was on board? A. Yes, sir.

Q. 107. And the three tugboats were alongside? A. Yes, sir.

Q. 108. In that situation who had charge of the navigation of that ship through the canal?

Mr. PILLSBURY. I think that is purely a question of law.

Mr. PARK. It is a question of fact.

The COURT. I think he may state; yes.

Mr. PILLSBURY. Will your Honor save my exception?

The COURT. Yes, I will save your exception.

A. Just as soon as that ship left the bank, pilot Lewis was in full charge and would give the orders, whatever he saw fit; he had full charge of everything just as soon as she left the bank.

Q. 109. He had charge of vessels going through the canal? A. Yes, sir; that is a well-known fact amongst all the pilots and captains of the tugboats,

that where Captain William Lewis — pilot Lewis — was, that he had full charge. That is what he got the extra money for.”

Geer, Rec. p. 405.

In accordance with this duty he immediately upon the floating of the steamer took charge of her navigation, which was acquiesced in by Captain Hammett of the Bay Port. The latter had been for 27 years a master mariner and for four years had held a master's license for steam vessels.

Circuit Court of Appeals, Rec. p. 648.

He held no license to navigate in the canal, he was unfamiliar with this waterway and had turned over the navigation of the vessel to the canal pilot, who was using one of the canal tugs as an aid in the passage of the vessel through the canal. He in no way interfered with the pilot as he saw no reason to criticise his action.

All the officers and crew of the Bay Port were on board ready for duty and prompt in obeying the orders of the pilot and in performing everything possible for the protection of their ship (Hammett, Rec. p. 507, Q. 104-105; Rec. p. 510, Q. 159-163; Rec. p. 511, Q. 183-184).

Hart, Rec. p. 490, Q. 73-81; Rec. p. 492, Q. 101-103.

L. Maker, Rec. p. 575, Q. 93.

Rochester, Rec. p. 315, X-Q. 95-96; Rec. p. 319, X-Q. 126.

Lewis, Rec. p. 226, X-Q. 316-322.

Captain Hammett remained passive in the handling of the ship except that he stood upon the bridge with the pilot interpreting to the engine room the bell signals. The petitioner submits that it would have been highly improper for Captain Hammett under the circumstances in

which the ship had been put in this sudden danger in this waterway unfamiliar to him to interfere with a man of so great experience and reputation (Morton, Opinion, Rec. p. 27) in the care of vessels in the canal as Pilot Lewis. His attempt to take her through the canal was in accordance with instructions from the Superintendent of the Canal Company given under authority reserved in the canal regulations governing the operations of vessels stranded in the canal as before shown, and was likewise in accordance with the opinion of the master of the Bay Port, salvor Lewis and pilot Lewis in consultation the evening of the first stranding.

The contention is made by the Circuit Court of Appeals that it might have been possible to have held the steamer in the channel of the canal in deep water by the three tugs or to place her at the dolphins 1,000 feet to the eastward, where she could be pumped out and her cargo adjusted, and it was for these acts of omission on the part of Captain Hammett that the petitioner has been held liable for the second stranding,—the inavailability of the tugs, the ignorance on the part of Captain Hammett of the existence of the dolphins and the impracticability of adjusting the cargo of the steamer in the canal in order to change her trim has been heretofore set forth.

In addition there is no adverse criticism of Captain Hammett in the pleadings or testimony. Failure to perform these acts had not been considered improper by any party in the case or by anyone except the Circuit Court of Appeals, which has made this finding contrary to the affirmative pleading of the respondent and from a hindsight view of the situation. See

Thompson v. Winslow, 128 Fed. 73, at p. 84.

On this second stranding the District Court states:—

“The Canal Company’s libel does not charge neg-

ligence in the management of the steamer while she was in the pilot's charge after she came off the bank; and no such contention has been made by it. It is further argued by the Canal Company,—under what charge in the libel is not clear,—that Captain Hammett was at fault for not preventing pilot Lewis from attempting to take the Bay Port through the canal after she floated. This question is not free from doubt. The day before, under much safer conditions both of current and of trim, the Bay Port had been unable to go through safely. It is evident that a great mistake was made in supposing that it was safe to renew the attempt under the conditions existing when she came off the bank. It is, however, to be remembered that the decision to go on was made *under the pressure of an unexpected emergency* (caused by the floating of the steamer so long before high water that the tide was still running at full strength), and that it followed out the plan of action which had received the assent of all parties in interest, including the Canal Company, although nobody foresaw the situation which actually presented itself. Captain Hammett was unfamiliar with the canal. He had been through it only a few times, and never with a loaded vessel. He was not pilot for it and had no intimate knowledge of the dangers which navigation there involved. He was without experience in handling vessels in the canal. The question presented was not one of ordinary navigation, but of navigation under very uncommon conditions and with reference to a peculiar waterway. Pilot Lewis was in many ways better qualified than Captain Hammett to decide what to do.

“The failure to tie up at the dolphins which were passed before the accident seems hard to justify on

the evidence before the court. They were reached after the first crisis of the emergency had gone by, and there had been time to consider what should be done. With the help of the tugs and her own engines the Bay Port could easily have been placed at them. While there, she would, however, have substantially obstructed the canal; and I have no doubt that, in failing so to deal with her, pilot Lewis had in mind Captain Geer's instructions to get out of the canal if possible. It does not appear that Captain Hammett knew about the dolphins before reaching them; and he testifies that even now he could not say whether it would have been safe to tie the Bay Port to them, or not,—a statement which I believe. Considering all the circumstances, I think Captain Hammett was not negligent for not preventing pilot Lewis from attempting to take the ship through to Sandwich."

District Court Opinion, Rec. pp. 32-33.

And the learned Judge of the District Court had the benefit of Captain Hammett's appearance on the witness stand in determining his general competency.

It was only the matter of a few moments when the steamer had reached a point in the canal where the second shoal was and shortly after which the second stranding occurred. She had handled without much difficulty to that spot, a distance of a mile, and the petitioner submits that if the depth of water in the canal had been as required by the statute under which the respondent company was incorporated there would, as the witnesses state, probably have been no stranding.

If the Canal Company was clearly guilty of faults, statutory or otherwise, adequate in themselves to account for the groundings, all doubts as to the management of the Bay Port should be resolved in favor of the latter.

The City of New York, 147 U. S. 72.

The Victory, 168 U. S. 410.

The Oregon, 158 U. S. 186.

The Kirnwood, 201 Fed. 428.

The British Isles, 264 Fed. 318.

The Bay Port is entitled to the benefit of the presumption in favor of a vessel that is properly manned with a competent master and crew.

Ross v. M. & M. T. Co., 104 Fed. 302, 304.

The petitioner therefore respectfully submits that from the time this vessel became so unexpectedly water-borne until she passed the set of dolphins 1,000 feet away, in fact until she collided with the bank, there was no opportunity for cool judgment, and the master of the vessel did what any reasonable navigator would have done, allowed an expert in the waterway to handle his vessel, especially in the carrying out of a plan which all the navigating and salvage experts had agreed upon the evening before as the most feasible under the circumstances which corresponded with the order of the canal superintendent, and which would have been proper if the condition of the canal had been as represented, and any error of omission which he may have made in failing to take the charge of his vessel out of the hands of the canal pilot, hold her in the waterway with tugs — a doubtful proceeding — or place her against the dolphins which were passed in a minute or two after she became afloat, — of the existence of which the master had no knowledge, — are errors of judgment *in extremis* for which the petitioner is not responsible, and the Circuit Court of Appeals in placing liability thereby upon the petitioner has failed to recognize and apply this well-settled rule of the admiralty practice.

The Oregon, 158 U. S. 186.

The Queen Elizabeth, 122 Fed. 406.

The Chicago, 100 Fed. 999.

The Pacific, 154 Fed. 943.

The Queen City, 189 Fed. 653.

The Philadelphia, 199 Fed. 299.

The Cetus, 202 Fed. 189.

The Buckhurst, 6 P. D. 152.

In this latter case the vessel was under duty to have exhibited her side lights. The circumstances, however, were that she had parted her anchors and had been driven over a sand in an unmanageable state owing to her rudder being disabled. The court held that the crew of the vessel would naturally be so engrossed in the effort to save her from becoming a wreck that in the hurry and confusion of the moment failure to comply with the regulations was excusable.

The Queen Elizabeth, *supra*, is a case of a collision of crossing vessels and the court, exonerating the master of the vessel, says:—

“ When the master of a vessel is confronted with a sudden peril, caused by the action of another vessel, so that he is justified in believing that collision is inevitable and he exercises his best judgment in the emergency, his action, even though unwise, cannot be regarded as a fault. ‘The judgment of a competent sailor *in extremis* cannot be impugned.’ *The Oregon*, 158 U. S. 186, 204, 15 Sup. Ct. 804, 39 L. Ed. 943. It is the duty of the court, as far as possible, to place itself in the position of the master and to endeavor to interpret the rules of navigation in the light of the perils and perplexities which surrounded him at the time—the impending danger, the excitement of the moment, the necessity for immediate action. Where a navigator of experience and good judgment acts in such circumstances, his action, if

within the limits of reasonable judgment and discretion, cannot be imputed to his vessel as a fault. If he acts upon his best judgment at the time it is sufficient, even though subsequent judicial investigation may show that he might have chosen a more prudent course. A master who the next moment may be sinking with his ship and crew cannot be expected to display the utmost coolness and deliberation. *The Dimock*, 23 C. C. A. 123, 77 Fed. 226; *The City of Augusta*, 25 C. C. A. 430, 80 Fed. 297; *The Iron Chief*, 11 C. C. A. 196, 63 Fed. 289; *The Havanna* (D. C.) 54 Fed. 411; *The Robert Healey* (D. C.) 51 Fed. 462."

Tested by this rule and by the general rule of what a reasonably prudent and competent navigator would have done under the circumstances, and Captain Hammett was all of that, no error unless it is that of judgment *in extremis* can be found, and for such an error the petitioner should not be held at fault.

CONCLUSION.

It is therefore respectfully submitted that the petition should be granted and a writ of certiorari issued as prayed for in the petition.

EDWARD E. BLODGETT,
Counsel for Petitioner.

U. S. Supreme Court, U. S.
FILED

OCT 2 1920

JAMES D. MAHER,
CLERK.

Supreme Court of the United States.

No. **4116** October Term, 1920.

WHITE OAK TRANSPORTATION COMPANY,
PETITIONER,

v.

**BOSTON, CAPE COD & NEW YORK
CANAL COMPANY,**
RESPONDENT.

No. **4124**

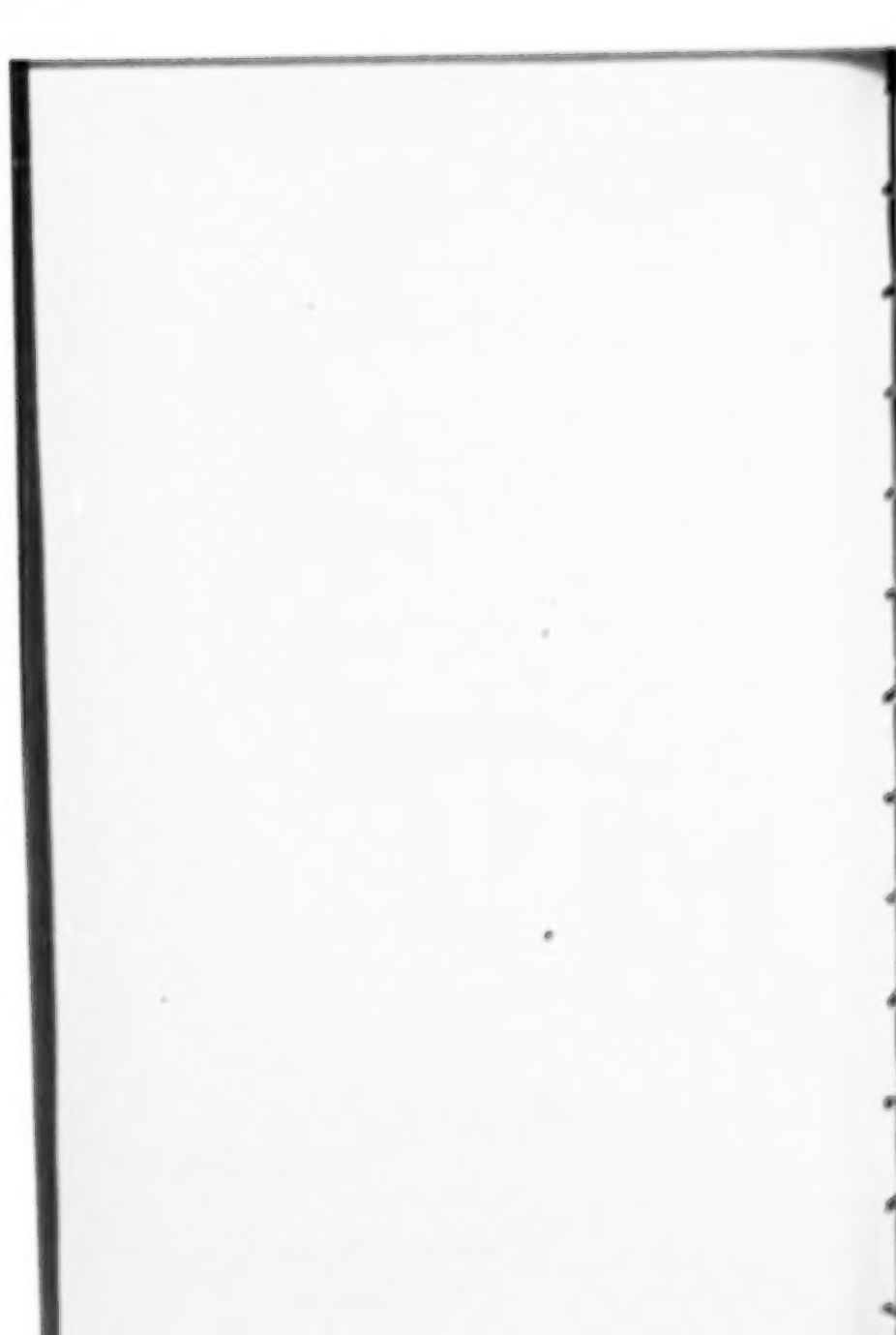
WHITE OAK TRANSPORTATION COMPANY,
PETITIONER,

v.

**BOSTON, CAPE COD & NEW YORK
CANAL COMPANY,**
RESPONDENT.

Brief for Respondent.

WILLIAM R. SEARS,
Counsel for Respondent.



INDEX TO BRIEF.

I. Statement of facts	1
II. Petitioner's assignments of error	2
III. Argument	4
A. The Circuit Court of Appeals did not err in finding that the <i>Bay Port's</i> owner was at fault in allowing the <i>Bay Port</i> to enter the canal	4
1. The <i>Bay Port</i> , as she was affixed by her owner or agents at the canal en- trance for passage through the canal, to the knowledge of her owner, was in an improper and unsuitable condition for such navigation	4
(<i>a</i>) She was overloaded	4
(<i>b</i>) She was improperly trimmed upon entering the canal	9
(<i>c</i>) She was apt to become un- manageable by reason of these faults	11
B. The Circuit Court of Appeals did not err in holding that the <i>Bay Port's</i> owner and the cargo owner were not entitled to recover for any injuries resulting from allowing the <i>Bay Port</i> to enter the canal	16
C. The Circuit Court of Appeals did not err in not ruling as a matter of law that the existence of the two shoals in the canal was the proximate cause of both strandings	23

	Page.
1. Any shoal that might have existed at Station 242 or further west in the canal, or any effect that such shoal might have had upon the navigation of the Bay Port, was not the proximate cause of the first stranding of that vessel	23
(a) That this shoal caused any sheer is not established	24
(b) Any sheer taken at or near the locus of the shoal was corrected	25
(c) The Bay Port, from Stations 242 to 250, was out of the center of the channel, and "hanging" to the right bank	27
(d) The failure of the Bay Port to regain the center of the channel while proceeding 800 feet or more was negligent	28
2. Any shoal that might have existed at Station 193 in the canal, and any effect that such shoal might have had upon the navigation of the Bay Port, was not the proximate cause of the second stranding of that vessel	31
(a) There was plenty of water over this shoal for the Bay Port not to "smell bottom"	31
(b) That this shoal caused any sheer is not established	33
(c) Any sheer taken at or near this shoal was corrected	34

- D. The Circuit Court of Appeals did not err in not ruling as a matter of law that the first stranding was the proximate cause of the second stranding 38
- E. The Circuit Court of Appeals did not err in not ruling as a matter of law that the Canal Company to avoid liability must prove that said shoal spots not only did not cause, but could not have caused, the two strandings or either of them 39
- F. The Circuit Court of Appeals did not err in holding the owner of the Bay Port at fault for allowing the Bay Port to proceed through the canal after she came afloat on December 14, 1916 44
1. The owner, by its agents or employees, was negligent in not holding the Bay Port in deep water, at or near the point where she slid off the bank, until she was pumped out, made seaworthy, and fit to complete the navigation of the canal 44
- (a) The master of the Bay Port does not escape responsibility for the safety of his ship, and for the determination to proceed through the canal, merely because Pilot Lewis was on board 44
- (b) The Bay Port was not held by the tugs in deep water, at or near the point where she slid off the bank, until she was made seaworthy and fit to navigate the canal 47

	Page.
(c) Any understanding as to taking the Bay Port to Sandwich in the event of her floating was not participated in by the Canal Company, and it is not affected thereby	51
(d) Captain Hammett neglected to make the Bay Port fast to dolphins 1000 feet east of where she floated, until she could be made seaworthy	53
G. The Circuit Court of Appeals did not err in not ruling as a matter of law that the decision so to proceed was an error in extremis	58
IV. Conclusion	64

TABLE OF CASES CITED.

	Page.
Alice State Bank v. Houston Pasture Co. (1918), 247 U.S. 240	8
Boston, C.C. & N.Y. Canal Co. v. Staples Trans. Co. (1917 C.C.A.), 246 Fed. 549	30
Boston & Maine R.R. v. Hooker (1913), 233 U.S. 97	43
Chesapeake & Delaware Canal Co. v. Gring (1908 C.C.A.), 159 Fed. 662	29
Chicago & Northwestern Ry. Co. v. Osborne (1892), 146 U.S. 354	7
Chic., B. & Q. R. Co. v. Richardson (1913 C.C.A.), 202 Fed. 836	26
Clark v. Chambers, 3 Q.B.D. 327	26
Compania La Flecha v. Brauer (1897), 168 U.S. 104	22, 38

TABLE OF CASES.

V

	Page.
Field v. Gowdy (1908), 199 Mass. 568	42
Forsyth v. Hammond (1897), 166 U.S. 506	7, 65
Hamilton Shoe Co. v. Wolf Bros. (1916), 240 U.S. 251	65
Hubbard v. Tod (1898), 171 U.S. 474	8
Lane v. Atlantic Works (1872), 111 Mass. 136	42
Newcomb v. Boston Protective Dept. (1888), 146 Mass. 596	42
Phil., W. & B. R.R. Co. v. P. & H. deG. S. T. Co. (1859), 23 How. 209	42
The Carlo Prince (1898), 170 U.S. 655	22, 38
The Dauntless, 121 Fed. 420	41
The E. A. Packer (1884 D.C.), 20 Fed. 339	26
The Ellis, 152 Fed. 981	40
The Germanic (1905), 196 U.S. 589	2, 38, 64
The Iroquois (1904), 194 U.S. 240	2, 38
The Maryland (1884 D.C.), 19 Fed. 551	26
The Natchez, 78 Fed. 183	35
The Ohio (1898 C.C.A.), 91 Fed. 547	29
The Oregon (1895), 158 U.S. 186	46
The Pennsylvania (1873), 19 Wall. 125	15, 39
The Sain Rotan (1884 D.C.), 20 Fed. 327	26
The Sam Sloan, 65 Fed. 125	35
The Selja, 243 U.S. 291	40
The Thielbek, 241 Fed. 209	40
Todd v. Traders & Mechanics Ins. Co. (1918), 230 Mass. 595	42



Supreme Court of the United States.

OCTOBER TERM, 1920.

WHITE OAK TRANSPORTATION COMPANY,
Petitioner,

v.

BOSTON, CAPE COD & NEW YORK CANAL
COMPANY, *Respondent.*

WHITE OAK TRANSPORTATION COMPANY,
Petitioner,

v.

BOSTON, CAPE COD & NEW YORK CANAL
COMPANY, *Respondent.*

Brief of the Respondent, Boston, Cape Cod & New York Canal Company.

I.

STATEMENT OF FACTS.

This is a petition brought by the White Oak Transportation Company praying that a writ of certiorari may issue, directed to the Circuit Court of Appeals for the First Circuit, commanding its certification to this Court of the record in the cases there entitled "*Boston, Cape Cod & New York Canal Company v. White Oak Transportation Company*, No. 1398," and "*White Oak Transportation Company v. Boston, Cape Cod & New York Canal Company*, No. 1399."

The Boston, Cape Cod & New York Canal Company, a Massachusetts corporation, organized under Special Act of the Massachusetts Legislature (Acts of 1899, c. 448), at the time of the stranding and sinking of the *Bay Port*, herein referred to, owned, maintained, and operated the Cape Cod Canal, a ship canal across Cape Cod, Massachusetts, from Buzzards Bay to Cape Cod Bay.

The White Oak Transportation Company, a corporation organized under the laws of the State of Maine, at the time of the said stranding and grounding owned the whaleback steamer *Bay Port*.

The Northern Coal Company, a corporation organized under the laws of the State of Maine, was the owner of the cargo of coal upon the *Bay Port* at the time of the said stranding and sinking.

The T. A. Scott Company, Inc., a corporation organized under the laws of the State of Connecticut, was engaged in the business of the repairing of damaged vessels, and the care and removal of wrecked crafts.

On December 13, 1916, in the early afternoon, the whaleback steamer *Bay Port*, 265 feet long, with a cargo of about 2393 tons of coal, applied at the Buzzards Bay, or western, entrance of the Cape Cod Canal for passage easterly through the canal. The *Bay Port* was met by Captain George G. Rochester, pilot of the Cape Pilot Association, licensed by the United States for the canal waters, and by the tug *Dalzelline* of the Cape Towing Corporation, a corporation organized under the laws of the State of Delaware.

The *Bay Port* proceeded into the canal in charge of Captain Rochester, and assisted by the tug *Dalzel-*

line, which was out in front with a hawser on the *Bay Port's* bow. It was about half tide, and a current of 3 or 4 knots was running west in the canal. When about 2 miles east of the Bourne Highway Bridge the *Bay Port* took a slight sheer to port, and, hugging the north bank of the canal for some distance, took a quick sheer to starboard, striking the south bank before getting straightened out, punching one small hole in the starboard bow. Her bow, as she lay upon the bank, was at Station 230 of the canal. The tugs *Hazelton* and *John C. Stuart*, of the said Cape Towing Corporation, responded to the call for assistance from the whistles of the *Dalzelline*, and attempted to pull the *Bay Port* off the bank, but, because of the falling tide, were unsuccessful. The *Bay Port* remained overnight, with her bilge resting on the south bank. Captain Joseph Lewis of The T. A. Scott Company, Inc., arrived at the scene of the stranding, in response to the request of the *Bay Port's* owner or agents, and, in the early evening of December 13, took charge of operations for the purpose of repairing temporarily and floating the *Bay Port*, and delivering her afloat to her owner or agents.

Early on the morning of December 14, 1916, the *Bay Port*, under the orders of Captain Joseph Lewis, was examined by a diver; the small hole was plugged up and the leak checked. Preparations to lighten the cargo of coal from the *Bay Port* were made, and part of the coal was so lightered onto the lighter *Salvor*, which had been made fast to the port side of the *Bay Port*, when the *Bay Port* slid off and floated away from the bank, it being about half tide, running east. At the time of said floating the tug *John C. Stuart* was

outside the *Salvor*, and the tugs *Dalzelline* and *Hazleton* were both hanging onto the bow of the *Bay Port*. All three tugs were headed west, and their engines were not running. When the *Bay Port* came afloat, Captain William Lewis, pilot of the Cape Pilot Association, who was at the scene, stepped on board the *Bay Port* from one of the tugs, and, in the emergency, assisted the captain of the *Bay Port* to guide her through the canal.

The *Bay Port*, logy, her nose down 18 inches, and listed to port about the same, drifted approximately one third of a mile before any of the tugs had turned and caught up with her. The *Dalzelline* then got a hawser on the bow of the *Bay Port* and began towing her. The *Bay Port* sheered badly from side to side, steering a zigzag course, and finally took a decided and sharp sheer to port. In spite of all attempts to check this sheer, the hawser from the *Dalzelline* parted and the *Bay Port* struck the north bank, after which her stern swung to the south bank, and she sank diagonally across the canal, with her stern on the south bank. She lay in that position for some time, and was finally blown up.

The Canal Company filed a libel against the *Bay Port's* owner to recover damages arising from injuries to the canal and its business due to the stranding and sinking of the *Bay Port*. The Canal Company also brought a similar suit against The T. A. Scott Company, Inc., which is not now before this Court. The *Bay Port's* owner filed a libel against the Canal Company to recover damages arising from the stranding, sinking, and loss of the *Bay Port*, in which action The T. A. Scott Company, Inc., was impleaded, and the

Northern Coal Company, the cargo owner, intervened.

These cases, though not formally consolidated, were tried together by agreement of counsel, and at the trial in the District Court the finding in each case was for the respondent therein, and each libel was dismissed, the respective respondents claiming appeals to the Circuit Court of Appeals.

In the cases now before this Court the Circuit Court of Appeals affirmed the finding of the District Court for the respondent in the case of *White Oak Transportation Company v. Boston, Cape Cod & New York Canal Company*, and reversed the finding of the District Court for the respondent in the case of *Boston, Cape Cod & New York Canal Company v. White Oak Transportation Company*.

The *Bay Port's* owner, therefore, filed its petition for certiorari, now before this Court, the mandates in both cases being stayed pending the disposition of the said petition.

II.

PETITIONER'S ASSIGNMENTS OF ERROR.

The *Bay Port's* owner assigns the following errors of the Circuit Court of Appeals:

"1. In finding that the petitioner was at fault in allowing its vessel to enter the canal.

"2. In holding, after finding the petitioner at fault in allowing its vessel to enter the canal and the respondent likewise at fault, that neither the petitioner nor the respondent nor the cargo owner is entitled to recover.

"3. In not ruling as a matter of law that the two shoal spots over which the steamer passed

just prior to both strandings were the proximate causes of the two strandings.

“4. In not ruling as a matter of law that the first stranding was the proximate cause of the second stranding.

“5. In not ruling as a matter of law that, inasmuch as the respondent admitted that the canal did not have the required statutory depth of water upon either of the shoal spots over which the steamer had passed just prior to each stranding, the burden was upon the respondent to prove not only that each stranding was not caused by such shoal spots, or either of them, but that they could not have been so caused.

“6. In holding the petitioner at fault for the act of the master of the Bay Port in allowing his steamer to proceed through the canal after she came afloat when the canal superintendent, acting under the canal regulations, had ordered the vessel through to the Sandwich end.

“7. In not ruling as a matter of law that if the captain of the Bay Port acquiesced in the action of the canal pilot taken under order of the canal superintendent and if such acquiescence was in accordance with his best judgment, even if it proved wrong, it was an error in extremis for which the petitioner should not be held liable in whole or in part.”

It is to be noted that in the case of *Boston, Cape Cod & New York Canal Company v. White Oak Transportation Company* the decree of the Circuit Court of Appeals is as follows:

"In No. 1398, the decree of the District Court is reversed, and the case is remanded to that court for further proceedings not inconsistent with this opinion; and the appellant recovers its costs of appeal" (Rec. p. 658).

Inasmuch as this case has been remanded to the District Court for further proceedings, there is no such final decree in the case as warrants the presentation to this Court of a petition for certiorari (*Chicago & Northwestern Ry. Co. v. Osborne* (1892), 146 U.S. 354, and also *Forsyth v. Hammond* (1897), 166 U.S. 506, 514).

It follows, therefore, that the case of *White Oak Transportation Company v. Boston, Cape Cod & New York Canal Company* is the only case properly before this Court. In this case the final decree of the Circuit Court of Appeals was entered on May 18, 1920, and a motion to amend this decree was filed by the intervening petitioner, Northern Coal Company, and heard on June 18, 1920, which in effect postponed the operation of the final decree. On September 23, 1920, the Circuit Court of Appeals entered a finding denying this motion. Subsequent to June 18, 1920, and prior to September 23, 1920, the petition for certiorari was filed. With reference to this case, therefore, it has been stipulated by the parties that for the purposes of this petition this Court may consider that the petition for certiorari was filed after September 23, 1920, on which date the Circuit Court of Appeals handed down its finding upon the motion of the intervening petitioner to amend the decree.

Inasmuch as the *Bay Port's* owner ~~also~~ filed a peti-

tion for certiorari, this Court will undoubtedly confine itself to the errors assigned in the said petition.

Holbrook v. Tol (1898), 171 U.S. 474, 494.
Alton State Bank v. Houston Padlock Co.
 (1916), 247 U.S. 200, 212.

III.

ARGUMENT.

A.

The Circuit Court of Appeals did not err in finding that the *Bay Port's* owner was at fault in allowing the *Bay Port* to enter the canal.

1. The *Bay Port*, as she was offered by her owner or agents at the canal entrance for passage through the canal, to the knowledge of her owner, was at an improper and unsafe condition for such service.

(a) *She was overladen.*

The testimony of Mr. Wilson, who handled the *Bay Port* when she was upon the lake, is the only testimony with reference to the use and purpose for which the *Bay Port* was intended to be built, and is not controverted. He stated that the *Bay Port* was a lake wharfbark, built for a draft of 14 feet 6 inches, never intended or built for an 18-foot 2-inch draft; that when upon the lake she was never loaded to a greater depth than 17 feet in the fall of the year; that, if loaded 2 feet deeper than 14 feet 6 inches, she would stove badly and be more susceptible to the action of currents (Rec. pp. 145, 146, Qs. 36-39; p. 188, Qs. 40-42). He also stated that, if she were loaded to a draft of 18 feet

2 inches at the sound, she was unable to navigate the sound (Roe, p. 189, Q. 45a).

That the *Big Port* was loaded beyond a draft of 14 feet 2 inches when she left Newport News is not disputed by the owner. All the witnesses upon this point testified that when she left Newport News her draft at all was 14 feet 10 inches. Her draft forward was somewhat in question, the witness first placing the forward draft at 15 feet 10 inches and other witnesses, Shelton and Hammett, placing it at 15 feet 6 inches (Shelton, Rec. p. 144, Q. 2b; Mack, Rec. p. 206, Qs. 15-16a). On the testimony of her officers, when she reached the sound she drew 14 feet 2 inches aft and 15 feet 6 inches or 15 feet 8 inches forward (Mack, Rec. p. 207, Qs. 23-24). In other words, according to her captain, her bow had gone down (Hammett, Rec. p. 303, Q. 3b).

Canal Company Exhibit 1 shows the deepest loading marks on the *Big Port's* side to be 15 feet. This, of course, is indicative of the greatest depth to which the vessel was intended or expected to be loaded (William, Rec. p. 44a, Qs. 144 (1)).

Upon all the witnesses, then, the vessel was overloaded upon starting her trip and when she reached the sound.

(4) *She was improperly trimmed upon entering the sound.*

The evidence is almost conclusive that a vessel of the *Big Port* type, to be properly trimmed, should be loaded so that she has a drag of from 1 foot to 30 inches; that is, loaded deeper astern than forward (Shelton, Rec. p. 304, X Qs. 157, 160, 168-169; Mack,

Rec. p. 428, X-Qs. 83, 84). It also appears that on the previous trip she was loaded, leaving port, with a drag of 2 feet 2 inches (Shelton, Rec. p. 565, X-Q. 351). When on the lakes her trim, once fixed before leaving port, would be preserved, because lake water was used for the engines, and the water tanks aft were used for ballast tanks. After she got into the sea service the necessity for fresh-water tanks caused the changing over of the ballast tanks in the stern to fresh-water tanks. In this way it was made impossible to maintain her trim by the use of these tanks, as had been intended, and as she had been designed, because of the fact that these tanks, holding 12,000 gallons of water, situated well aft in the vessel, gradually emptied and lightened the vessel aft as the water was used. The coal bunkers were also situated well aft in the vessel. It is obvious that the consumption of coal and water must inevitably change her trim.

Upon this trip it was estimated that her stern would come up approximately 6 inches to 7 inches (J. Maker, Rec. p. 425, Q. 34; Shelton, Rec. p. 543, Qs. 27, 28) before she reached the Cape Cod Canal, by reason of this use of the fresh water and coal. But the master of the *Bay Port* stated that she was properly trimmed when she left port (Shelton, Rec. p. 565, X-Qs. 344-349). Accordingly any decided change in trim like this change would be improper.

By reason of such use of coal and fresh water, the bow of the vessel dropped and the stern lifted, as some witnesses said, a few inches (Hammett, Rec. p. 503, Q. 36; Shelton, Rec. p. 543, Qs. 27, 28; J. Maker, Rec. p. 427, X-Q. 65).

Upon all the evidence, if, when she got to the canal,

she was 17 feet 8 inches forward and 18 feet 2 inches aft, her stern had lifted 8 inches and her bow lowered 2 inches, a net difference of 10 inches. In other words, she had only about one third the drag she should have, as she was by the stern merely 6 inches, which none of the witnesses stated was a sufficient drag to constitute proper trim. In addition to the statements of the *Bay Port* witnesses as to the draft, Donnelly, of the tug *Dalzelline*, stated that she was "by the bow about one foot" entering the canal (Donnelly, Rec. p. 266, Qs. 20, 21; p. 274, X-Qs. 116, 117).

Wilson, who knew the vessel better than anybody else, testified that the use of coal and water from Newport News to the canal would put her by the head from 14 inches to 18 inches; that is, a considerable difference in her trim (Rec. pp. 187, 188, Qs. 50-59; p. 192, X-Qs. 114-118).

The *Bay Port*, therefore, was improperly loaded and overloaded when she left Newport News, and was improperly trimmed and loaded for purposes of proper steering and handling when she offered herself for passage through the canal.

(c) *She was apt to become unmanageable by reason of these factors.*

The witness Wilson stated that there was a difference in her handling, depending on whether she was loaded to a draft of 14 feet or 17 feet, and that she would not steer so well when loaded to the greater draft, but was more apt to sheer, and was more susceptible to the action of currents (Rec. pp. 185, 186, Qs. 39-49), and also stated that, loaded as she was, and down by the head, as she would necessarily be from the

use of coal and water, she was apt to become unmanageable, and therefore was not safe to take into the canal (Rec. p. 189, Q. 65).

This drag or deep-stern loading was necessary in order to make her handle and steer properly, the witness Hart and other witnesses offered by her owner testifying that she steered better that way (Hart, Rec. p. 495, X-Qs. 139-141; p. 496, Qs. 143-147; Shelton, Rec. pp. 563, 564, X-Qs. 323-337; Dunton, Rec. p. 500, X-Qs. 48, 49; J. Maker, Rec. pp. 426-428, X-Qs. 61-69, 79; B. Kemp, Rec. p. 465, X-Q. 44).

Pilot Lewis testified that the *Bay Port* steered "kind of bad" after reaching the canal, sheering just before she got to the railroad bridge on entering the canal, and again sheering to port before taking the sheer to starboard on which she stranded (Rec. pp. 200, 201, Qs. 15, 18, 22, 25). The witness Donnelly also testified that she sheered badly outside the canal from the time the *Dalzelline* picked her up (Rec. p. 266, Q. 15).

The history of the vessel's trip prior to reaching the canal, and her condition at the time of applying for passage, was such that it was negligent upon the part of the master of the *Bay Port*, and therefore upon the part of the White Oak Transportation Company, to take the vessel through the canal.

The District Court found that the *Bay Port* was a type of vessel that did not "handle as sharply nor as well as those of the usual deep sea model," and that she was deeply laden (Rec. p. 23).

The Circuit Court of Appeals upon this point found as follows:

"We think this finding in regard to her steering

qualities, qualified as it was, that 'she steered as well as the ordinary whaleback steamer,' is in accord with the evidence; but this convinces us that any steamer of this type, when deeply laden, is very difficult to handle; much more so than those of 'the usual deep sea model,' and that even when properly trimmed and in tow of a tug she is liable to sheer. . . . While we think the *Bay Port* was negligent in attempting to go through the canal, yet we also think the Canal Company was equally negligent in allowing her to enter it" (Rec. pp. 651, 652).

Both Courts concurred in the finding of fact that the *Bay Port* was difficult to handle and liable to sheer.

The *Bay Port's* owner contends that the finding of the Circuit Court of Appeals that—

"Any steamer of this [whaleback] type, when deeply laden, is very difficult to handle; much more so than those of 'the usual deep-sea model,' and that even when properly trimmed and in tow of a tug she is liable to sheer" (Rec. p. 651)—

was "wholly unwarranted," and "not based upon the evidence" (Petitioner's Brief, p. 20).

Yet, apart from the circumstantial evidence in the case, there was direct evidence that the *Bay Port* was liable to sheer even when properly trimmed, and with a tug ahead (Wilson, Rec. pp. 187, 188, Qs. 55-58).

B.

The Circuit Court of Appeals did not err in holding that the *Bay Port's* owner and the cargo owner were not entitled to recover for any injuries resulting from allowing the *Bay Port* to enter the canal.

The two findings of the Circuit Court of Appeals bearing upon this point, and upon which the *Bay Port's* owner contends that the Circuit Court of Appeals erred in not dividing damages, are as follows:

“While we think the *Bay Port* was negligent in attempting to go through the canal, yet we also think the Canal Company was equally negligent in allowing her to enter it and that the hazard of her attempted passage was assumed by the Canal Company with full knowledge of the risk” (Rec. p. 651).

“While we think the *Bay Port* was negligent in attempting to use the canal in her deeply laden condition, we think the Canal Company was equally at fault in allowing her to use it, and that neither should recover for any damage which may have been suffered by reason of her attempt to go through in the condition in which she was when she entered it, no negligence being alleged in her navigation by the pilot or the tug boat or members of her own crew” (Rec. p. 652).

The *Bay Port's* owner contends that, by reason of the above findings, the Circuit Court of Appeals departed from the admiralty rule of dividing damages in cases of “mutual fault,” and applied the common-law

rule of no recovery in cases of contributory negligence (Petitioner's Brief, p. 29).

A careful reading of the opinion of the Circuit Court of Appeals, however, reveals the fact that the petitioner is in error in making such contention. As is pointed out in the opinion of the Circuit Court of Appeals upon the intervening petitioner's motion to amend the decree, the Court was—

“then discussing the liability of the owners of the Bay Port under the allegations of negligence in the libel of the Canal Company that they had caused a vessel of the type of the Bay Port, and laden as she was, to enter the canal; and what we then said related to the condition of the Bay Port when she entered the canal” (Rec. p. 670).

In order to apply the rule of divided damages, negligence chargeable against the respondent must first be found, and, if none is so found, there is nothing upon which the rule can operate. In *The Pennsylvania* (*supra*), upon which the petitioner relies, it is stated as follows:

“It must be conceded that if it clearly appears the fault could have had nothing to do with the disaster, it may be dismissed from consideration.”

The Pennsylvania (1873), 19 Wall. 125, 136.

The Circuit Court of Appeals, as did the District Court, carefully distinguished between the happenings of the first and those of the second day, and both Courts found that the events of the first day were not the proximate cause of those of the second day. While

the Circuit Court of Appeals found that the *Bay Port's* owner and the Canal Company were both negligent in allowing the *Bay Port* to enter the canal, yet, in finding that the Canal Company was not negligent with reference to the first stranding, it also found that the allowing the *Bay Port* so to enter was not the proximate cause of the first stranding, nor of the loss of the *Bay Port* with its cargo.

The District Court found as a matter of fact, with reference to the first stranding, as follows:

“It does not seem to me that the condition of the canal there (near the first shoal) was such as to warrant a finding of negligence against the Canal Company for permitting the *Bay Port* to use the canal. The Canal Company was not at fault for the first stranding, which appears to me to have been due either to pure accident, or to faulty navigation by the pilot” (Rec. p. 27).

The Circuit Court of Appeals found upon this point as follows:

“The learned Judge of the District Court has found that while there was a less depth of water than twenty-five feet near the places in the canal where the two strandings occurred, there were from twenty-one to twenty-two feet of water on the shoal over which the *Bay Port* passed before the first stranding and twenty-three feet or more on the shoal passed over by her before the second; and that, as her greatest draft was a little over eighteen feet, the contention of her owners that she ‘smelled the bottom’ and was caused to sheer

by the shoal water was not sustained; and that, assuming that these shoals caused her to sheer, they were so far distant from the places where the vessel stranded, they were not the proximate cause of her stranding in either case, as she had passed the shoal before the first stranding by about 1,000 feet, and by about 2,000 feet before the second, and for the whole of each of these distances there was a depth of more than twenty-five feet of water in the channel. He has also found that the projection on the north bank of the canal did not reach into the channel of the canal and did not constitute any menace to navigation, that vessels constantly passed it in safety, and that the condition of the canal here did not warrant a finding of negligence against the Canal Company.

“We think these findings are sustained by the evidence. The grounds on which they are based are so fully stated in the careful opinion of the learned District Judge that it is unnecessary to add anything to the reasons which he has given” (Rec. pp. 650, 651).

And again, after hearing the intervening petitioner's motion to amend the decree, the Circuit Court of Appeals held as follows:

“We have concurred in the finding of the District Court that neither stranding was occasioned by any negligence of the Canal Company in the construction or maintenance of the canal” (Rec. p. 670).

It is to be noted that the dissenting opinion of

Judge Anderson merely applies to the cargo, and does not apply to the case of the *Bay Port's* owner against the Canal Company (Rec. p. 671).

If, then, the Canal Company, as was found by both Courts, was not responsible for the first stranding, any negligence in allowing the *Bay Port* to enter the canal was not the proximate cause of such stranding. The Canal Company was not responsible for anything resulting from such stranding, unless some subsequent negligence caused some subsequent injury.

But, immediately following the finding of the Circuit Court of Appeals quoted above and repeated below—

“While we think the Bay Port was negligent in attempting to use the canal in her deeply laden condition, we think the Canal Company was equally at fault in allowing her to use it, and that neither should recover for any damage which may have been suffered by reason of her attempt to go through in the condition in which she was when she entered it, no negligence being alleged in her navigation by the pilot or the tug boat or members of her own crew”—

appears the following:

“When she came afloat, however, on the morning of December 14th, her unmanageability had been largely increased. It is self-evident that a vessel down at the head eighteen inches, with a list of fifteen inches, as testified to by her captain, and with water in her hold above her cargo, would be a more unwieldy vessel to navigate than she

was on the preceding day, and that in this narrow waterway with its necessary bends and a tidal current of three or four knots an hour she would be likely, in view of what had happened, to sheer badly and come into collision with the canal bank on one side or the other. While there was evidence that Superintendent Geer gave instructions on the night of December 13th to get her through the canal as quickly as possible, this instruction did not authorize an attempt to get her through in the condition in which she was after she floated.

“We do not think any sudden emergency arose when she slid off the bank which was of such a character as to excuse her master from exercising the judgment which the law exacts from a master who has in his charge a valuable ship and cargo and which would authorize him to surrender the command of his ship in her condition to a pilot upon whose skill in navigation only he was to depend. He was not confronted with imminent danger, although his vessel was caught by the current and began to drift with it. There were three tugs at her side with steam up and all of the witnesses, including Captain Hammett, testified that it would have been possible for these tugs to hold her in the channel of the canal in deep water, or to place her at the dolphins which were only about 1,000 feet to the eastward, until she could be pumped out and her cargo adjusted, so that she might be in better condition to undertake the passage of the remainder of the canal” (Rec. p. 653)—

and later appears the following:

“We think that Captain Hammett was justified in assuming that Lewis was to complete the pilotage of the Bay Port through the canal, as Rochester, the pilot of the previous day, was not present; but Lewis’ duties related only to pilotage through the canal. The question of determining whether the vessel was in proper condition for navigation was not for his decision, however, but for that of Captain Hammett alone; and even with the pilot in command of the navigation of the vessel, it has been held that the captain is not to leave the whole responsibility to him” (Rec. p. 654).

“While, when she entered the canal upon the previous day, we think the Canal Company assented to her navigation of the canal in the condition in which she then was, we do not find any evidence that the Canal Company assented to her undertaking the navigation of the canal in the condition in which she was when she slid off the bank” (Rec. p. 655).

“We think it cannot be said, therefore, that the Canal Company assented that the Bay Port might attempt the navigation of the canal under the conditions in which she then was” (Rec. p. 655).

And again, in its opinion on the intervening petitioner’s motion to amend the decree, the Circuit Court of Appeals held:

“We have concurred in the finding of the District Court that neither stranding was occasioned

by any negligence of the Canal Company—in the construction or maintenance of the canal” (Rec. p. 670).

The Circuit Court of Appeals accordingly found that the events of the second day, culminating in the loss of the *Bay Port*, with her cargo, and the injury to the canal, were due solely to the negligent determination of the *Bay Port's* master to proceed through the canal with the *Bay Port* as she came off the bank on December 14, 1916, and “before she was pumped out and her cargo adjusted.” The Circuit Court of Appeals, as set forth above, expressly negatived any negligence upon the part of the Canal Company, either by way of allowing the *Bay Port* in the canal or otherwise, which in any way contributed to either stranding.

The District Court, in addition to finding the Canal Company blameless for the first stranding, also found that the Canal Company was in no way guilty of negligence contributing to the events of the second day, as appears by the following:

“About two thousand feet west of where the *Bay Port* finally landed, she passed over a shallow spot much like that above described in connection with the first stranding. There was everywhere on it, except close to the sides of the channel, twenty feet of water at mean low tide; and at the time of the accident,—the tide being about half up,—about three feet more, i.e., about twenty-three feet. It is contended by the owner of the *Bay Port* that the shoal caused her to sheer and was the proximate cause of the accident; and that the Canal Company is therefore liable. This shoal

was farther from the place of the final accident than the first shoal was from the first accident. Throughout the intervening distance there was at least twenty-five feet of water at mean low tide. Two separate sheers were taken and broken after passing the shoal before the steamer finally struck. It seems to me that even if the shoal be regarded as a negligent obstruction in the canal, it was not the cause of the accident.

“From what has been said, it follows that the charges of negligence against the Canal Company by the Transportation Company have not been sustained, and that the libel against it must be dismissed” (Rec. pp. 30, 31).

There being, therefore, no finding by either Court of any negligence upon the part of the Canal Company causing or contributing to the loss of the *Bay Port*, there was consequently no finding of mutual fault, which necessarily would have to be made in order to call into operation the admiralty rule of dividing damages.

Both Courts having concurred in the finding of fact that the Canal Company was in no way responsible for either stranding, or for the loss of the *Bay Port* and cargo, the Circuit Court of Appeals committed no error in not dividing damages, and this finding ought not to be disturbed.

The Germanic (1905), 196 U.S. 589.

The Iroquois (1904), 194 U.S. 240, 247.

The Carib Prince (1898), 170 U.S. 655, 658.

Compania La Flecha v. Brauer (1897), 168 U.S. 104, 123.

C.

The Circuit Court of Appeals did not err in not ruling as a matter of law that the existence of the two shoals in the canal was the proximate cause of both strandings.

It might be conceived that, where facts are not disputed, the Court might rule, as a matter of law, that such facts established negligence, which was the proximate cause of the injury or loss. But where facts are in dispute, it is clearly a question of fact, to be determined by a jury if there is one, otherwise by the Court, whether or not a party is negligent, and whether or not any such negligence was the proximate cause of the loss complained of.

In these cases the evidence with reference to the negligence of the Canal Company was at least conflicting, and there was ample evidence to the effect that neither shoal in any way caused either stranding.

1. ANY SHOAL THAT MIGHT HAVE EXISTED AT STATION 242 OR FURTHER WEST IN THE CANAL, OR ANY EFFECT THAT SUCH SHOAL MIGHT HAVE HAD UPON THE NAVIGATION OF THE BAY PORT, WAS NOT THE PROXIMATE CAUSE OF THE FIRST STRANDING OF THAT VESSEL.

The shoal alleged to exist about Station 242 on December 13, 1916, terminated easterly at Station 242 (Canal Co. Exhibit 2), 1200 feet west of the point where the *Bay Port's* bow struck upon the south side of the canal, at Station 230 (Crocker, Rec. p. 298, X-Qs. 140, 141; *Bay Port* Exhibit 2), the distance between stations being 100 feet. From Station 241 to Station 230 there were at all points in the channel on November 20, 1916, and therefore presumably on December 13, at least 25 feet of water at mean low water,

and in most places over 30 feet (*Bay Port* Exhibit 1; Crocker, Rec. p. 289, Qs. 21, 28).

For the *Bay Port's* owner to maintain that the shoal at Station 242 was the proximate cause of the first stranding, it must, in effect, maintain that the *Bay Port* was out of control from the time she approached or crossed that shoal until the time she struck. The testimony, however, shows that she was not out of control for that distance, and that from Station 242 to Station 230 there was at all points in the canal a depth of at least 25 feet at mean low water. All the testimony is to the effect also that the *Bay Port* sheered a little to port at about Station 242, the witnesses called by the Canal Company, including Pilot Rochester, testifying that she sheered to port in deep water before she reached this shoal (W. T. Lewis, Rec. pp. 200, 201, Qs. 15-25; p. 228, Qs. 344, 345; Rochester, Rec. p. 312, Qs. 45-48; p. 321, X-Q. 142); but no witnesses, even those for the *Bay Port's* owner, testified that she sheered to port further east than Station 242 (Hammett, Rec. p. 506, Q. 86). In fact, the sketch offered by Professor Reeve, based upon Captain Hammett's and other evidence, places her at Station 242 (Reeve, Rec. p. 585, Q. 22; *Bay Port* Exhibit 16).

(a) *That this shoal caused any sheer is not established.*

There is grave question whether such shoal caused any sheer. The witnesses offered by the owner testified that, at a speed of 5 knots, the *Bay Port*, in order not to sheer because of shoal water, should have under her 4 to 5 feet of water (J. W. Maker, Rec. p. 428, Q. 75; Dunton, Rec. p. 499, Q. 39). On December 13, 1916,

the tide was high at 12 o'clock noon (Rec. pp. 80, 94, Ints. to Canal Co. 74). The tide began flowing west at 11.50 a.m. (*Bay Port* Exhibit 8). At 2.15 p.m. there was a rise of tide of 4 feet at the point where she struck (Rec. pp. 81, 94, Ints. to Canal Co. 76; Crocker, Rec. p. 305, X-Qs. 210, 211).

Clearly, then, inasmuch as the soundings on the shoal do not show less than 19 feet 3 inches in any place, and in most places show more (*Bay Port* Exhibit 1), there was at least 23 feet 3 inches of water at every point on the shoal. This would give a depth of 5 feet 1 inch of water under the *Bay Port*, instead of $3\frac{1}{2}$ feet as stated by the petitioner (Brief, p. 37). This was ample water for her to navigate without "smelling the bottom."

Pilot Rochester, one of those best qualified to state the facts, testified that she did not sheer on the shoal at all (Rec. p. 321, X-Qs. 141, 142).

In fact, the mate said he never knew a whaleback to sheer in water 22 feet deep (Shelton, Rec. p. 557, X-Qs. 251, 252).

(b) Any sheer taken at or near the locus of the shoal was corrected.

But, even assuming that this shoal did cause a sheer to port, that sheer was but slight, and of little consequence (Hart, Rec. p. 488, Qs. 50, 51; Hammett, Rec. p. 506, Q. 87; p. 529, X-Qs. 309-314), and could not have had anything to do with her striking the south bank 1200 feet east, all the witnesses stating that the vessel speedily straightened out (Hammett, Rec. p. 506, Q. 91; W. T. Lewis, Rec. p. 200, Q. 22). Professor Reeve, the expert on hydraulics, called by the owner, on cross-

examination stated that, when she left the shoal, the shoal itself would correct any sheer that the vessel might have taken, and that the effect of the sheer would be lost when the vessel left the shoal (Reeve, Rec. pp. 593, 594, X-Qs. 75-80).

Any effect that the shoal might have had, therefore, was lost when the *Bay Port* crossed it and the sheer was corrected, and, if any intervening factor then caused the later sheer of the *Bay Port*, clearly the shoal was not the proximate cause of her stranding.

The maxim *causa proxima non remota spectatur* applies to distinguish negligence for the consequences of which a defendant is liable from that which is merely collateral and immaterial upon the question of liability. Negligence such as will attach liability cannot be established merely by showing that, but for a previous improper act of the defendant, the accident would not have occurred. The act complained of must have some proper connection, as a cause, with the damage which followed, as its effect.

The Maryland (1884 D.C.), 19 Fed. 551.

The Sam Rotan (1884 D.C.), 20 Fed. 327.

The E. A. Packer (1884 D.C.), 20 Fed. 339.

Chic., B. & Q. R. Co. v. Richardson (1913 C.C.A.), 202 Fed. 836.

“An action will not lie where the loss, although arising from an unlawful or negligent act of the defendant, does not flow from it, and was not the reasonable, probable, or likely result of it.”

Clark v. Chambers, 3 Q.B.D. 327.

(c) *The Bay Port, from Stations 242 to 230, was out of the center of the channel, and "hanging" to the right bank.*

The helmsman, L. Maker (Rec. p. 571), stated that this first sheer was not so much of a sheer as a "hanging to the bank," testifying as follows:

"Q. 23. What was the first you noticed of any appreciable sheer that day? A. Just before we ran ashore we took a sheer to port, a small sheer; it wasn't so much of a sheer as hanging to the bank, that way, you know; and she wouldn't come out, wouldn't answer her wheel.

"Q. 24. Wouldn't come out from the bank? A. No, sir. It wasn't exactly a sheer. But when she did let go, she went on a rank sheer to the starboard.

"Q. 25. To the starboard side? A. To the starboard bank.

.

"Q. 28. Now, when she took this rank sheer to the south bank,—that is, to your starboard,—what did you do? A. I put the wheel over as the pilot told me.

"Q. 29. Just tell what happened. Did she mind her helm? A. No, sir; she kept on going, and we got the wheel hard over, and she stopped swinging, but she was too far gone to come back."

Rec. p. 581:

"X-Q. 161. In reply to Mr. Blodgett you said that the first day she would not come off the bank.

That was just previous to her taking this rank sheer? A. Yes, sir.

"X-Q. 162. What did you mean by that expression, that she would not 'come off the bank'. In the first place, how near the bank was she? A. Well, I couldn't tell you, but I know she was some little distance out,—out of the centre.

"X-Q. 163. Towards which bank? A. Towards the port bank and running along parallel with it.

"X-Q. 164. How far out of the centre was she? A. She wasn't more than her width.

"X-Q. 165. And how wide was she? A. Well, say 50 feet out of the centre towards that bank, and she wouldn't swing away from it.

"X-Q. 166. She didn't sheer at that time, but she just clung to the bank, and you could not get her away? A. Clung to the bank."

Pilot Rochester stated that the shoal had nothing to do with her stranding, the *Bay Port* being too far by it, and nothing but this rank sheer, the cause of which he did not know, caused the stranding (Rec. p. 321, X-Qs. 137-143).

(d) *The failure of the Bay Port to regain the center of the channel while proceeding 800 feet or more was negligent.*

The failure to take any precaution to regain the center of the channel after being set over 50 feet from the center (the channel being but 100 feet wide), and the navigation of the canal on that line for over 1000 feet, was clearly negligent. Whether the negligence

was that of the pilot, master, or helmsman, it is chargeable to the owner, and caused, or contributed in causing, the first stranding.

The book of regulations which Captain Hammett had received (*Bay Port* Exhibit 11) contained the following provision, at page 13:

“19-A Any craft moving outside of the line of the channel must allow for the angle of the side slopes and two feet in addition to the draft of the vessel to guard against possible variations of the slopes due to currents of [or] other causes.”

It also contained, in paragraph 24, on page 14, referring to the stretch from Bourne Highway Bridge east:

“Keep here, as elsewhere, in the middle of the channel.”

Violation of these two reasonable regulations, warnings, or directions constituted negligence, causing or contributing to the stranding.

Chesapeake & Delaware Canal Co. v. Gring
(1908 C.C.A.), 159 Fed. 662.

The burden was upon the *Bay Port's* owner not only to show that her sheer was caused by the shoal at Station 242, but also to show that her own management was such, both before and after the sheer, as not to have contributed to the final stranding.

The Ohio (1898 C.C.A.), 91 Fed. 547.

As was said in another case relating to the Cape Cod Canal:

“It might well have been negligence on their part to allow themselves to get into any part of the canal where water deep enough . . . could not reasonably have been expected.”

Boston, C.C. & N.Y. Canal Co. v. Staples Trans. Co. (1917 C.C.A.), 246 Fed. 549.

The *Bay Port* made no effort to slow up, to pull over, or to drift over into the center of the channel, as she could and should have done if she had been affected by the shoal, before rounding this turn, which was known to be a more or less difficult place to steer (Opinion Dist. Court, Rec. p. 27).

The *Bay Port* owner's contention that, inasmuch as the Massachusetts statute provided for the construction of the canal to a minimum depth of 25 feet at mean low water, the fact that upon this shoal spot there was less than that amount constituted a violation of the Canal Company's statutory duty, and as a result thereof the Canal Company, to absolve itself from any liability for either stranding, was bound to prove that these shoal spots not only did not cause or contribute, but could not have caused or contributed, to the accident (Petitioner's Brief, pp. 39, 54), will be discussed hereafter in that part of the argument directed against the petitioner's fifth assignment of error.

2. ANY SHOAL THAT MIGHT HAVE EXISTED AT STATION 193 IN THE CANAL, AND ANY EFFECT THAT SUCH SHOAL MIGHT HAVE HAD UPON THE NAVIGATION OF THE BAY PORT, WAS NOT THE PROXIMATE CAUSE OF THE SECOND STRANDING OF THAT VESSEL.

(a) *There was plenty of water over this shoal for the Bay Port not to "smell bottom."*

The evidence in relation to this shoal is practically undisputed. The contention of the *Bay Port's* owner (Petitioner's Brief, pp. 40, 41, 43) that the District Court was mistaken in finding that there was upon this shoal 20 feet of water at mean low water, when there was in some places less than 20 feet of water at mean low water, is controverted by Mr. Crocker, the then engineer of the canal, who testified positively that at the time of the accident dredging had been going on there from November 27 until after December 14, and that there was 20 feet of water at low water, instead of the soundings which appear on the blue-prints relied upon by the petitioner (*Bay Port* Exhibits 3, 4, showing the soundings which existed before that dredging took place—W. S. Crocker, Rec. p. 621, Qs. 266, 267, X-Qs. 269, 270; p. 622, X-Q. 278; p. 625, X-Qs. 306, 307; Statement of Canal Co., Rec. p. 604).

The state of the tide has been described. It had been running easterly in the canal from 6 a.m. (*Bay Port* Exhibit 8), and at 10.15 a.m., when the *Bay Port* floated, the water which would result from the rise of the tide on this shoal, assuming the water over the shoal to be 20 feet at mean low water and the rise of the tide 6 or 7, would be at least 3 feet, and probably more (W. T. Lewis, Rec. p. 223, X-Qs. 286, 287;

Rec. pp. 81, 94, Ints. to Canal Co. 77), making at least 23 feet of water over this shoal at the time. Various witnesses testified that from 3 to not over 5 feet of water under her was sufficient for the *Bay Port*, at a speed of 5 knots, to navigate without "smelling the bottom" (J. W. Maker, Rec. p. 428, Q. 75; B. Kemp, Rec. p. 466, X-Q. 60, both witnesses for the Scott Co.). Neither put the requirement above 5 feet, the witness Kemp putting it as low as 3 feet, and also testifying as follows (Rec. p. 467):

"The Court. Of course, if the vessel is practically drifting, as long as there is water under her at all it does not affect the steering?

"The Witness. It does not affect her,—none at all" (B. Kemp, X-Q. 60).

To the same effect also, Shelton (Rec. p. 558, X-Qs. 259-262).

It is contended by the owner of the *Bay Port* that this shoal caused her to sheer, and was the proximate cause of the second stranding, and that the Canal Company was therefore liable for the sinking.

But it is to be noted that no such error was assigned by the petitioner before the Circuit Court of Appeals to the finding of the District Court, which is set forth verbatim below:

"About two thousand feet west of where the *Bay Port* finally landed, she passed over a shallow spot much like that above described in connection with the first stranding. There was everywhere on it, except close to the sides of the channel, twenty feet of water at mean low tide;

and at the time of the accident,—the tide being about half up,—about three feet more, i.e. about twenty-three feet" (Rec. pp. 30-31).

Upon all the testimony there was ample water over this shoal for the proper navigation of the *Bay Port*, even at a 5-knot speed (the uncontradicted testimony of Pilot Lewis being, however, that her engines were stopped and she was drifting, in which case she would require but sufficient water to float her, and not 5 feet—Rec. p. 205, Q. 69).

(b) That this shoal caused any sheer is not established.

There was testimony to the effect that she sheered before she got to this shoal. Pilot Lewis testified that she was sheering badly from side to side from the time she floated; that she sheered west of the shoal, at a point where there was 40 or 50 feet of water, and that she straightened out on the shoal (Rec. p. 205, Q. 69; p. 228, Qs. 349-351; p. 227, X-Q. 334).

Her condition, control, and method of proceeding has been partly set forth. In addition to Pilot Lewis, whose testimony has been mentioned, the witness Donnelly stated that "practically from the time she got afloat she was sheering" (Rec. p. 268, Q. 45), and, to the same effect, Wagner (Rec. p. 280, Q. 38). The witness J. Kemp stated that, being down at the head, with her engines working, her stern would swing one way or another (Rec. pp. 387, 388, X-Qs. 68-73).

The helmsman testified that for the first third of a mile she could not be steered at all, but just drifted (L. Maker, Rec. pp. 576, 577, X-Qs. 102-105, 111, 120).

There is therefore nothing upon which to base the claim that this shoal of itself caused any sheer.

(c) *Any sheer taken at or near this shoal was corrected.*

All the witnesses called by the owner, testifying on the point, testified that the sheer taken at or near the *Trilby*, which was at work on this shoal, was broken (L. Maker, Rec. p. 573, Qs. 61, 62; Shelton, Rec. p. 562, X-Qs. 308-315; Hammett, Rec. p. 511, Qs. 176, 177), so that whether she sheered before she got to the shoal or upon it is immaterial. Even by the soundings as shown by the blue-prints (*Bay Port* Exhibits 3, 4), which were made August 17 and November 18, 1916, before the shoal was dredged to 20 feet, the eastern end of the shoal was west of Station 190.50, so that from Station 190.50 to Station 169, where she struck (*Bay Port* Exhibit 7), was 2150 feet; and from Station 193 to Station 169 was 2400 feet.

It is to be noted that no error was assigned by this petitioner, before the Circuit Court of Appeals, to the finding of the District Court, with reference to this shoal, as follows:

“This shoal was farther from the place of the final accident than the first shoal was from the first accident. Throughout the intervening distance there was at least twenty-five feet of water at mean low tide. Two separate sheers were taken and broken after passing the shoal before the steamer finally struck” (Rec. p. 31).

Clearly, then, upon the same reasoning as applied to the shoal at Station 242, and the first stranding, this

shoal was not the proximate cause of the second stranding or sinking.

This is supported and borne out by the fact that the sheer upon which the *Bay Port* stranded lasted for less than one half her length, as testified to by a witness for the owner (Hart, Rec. p. 494, X-Qs. 120, 121), and this witness did not notice any sheer to starboard (as was the sheer near the *Trilby*), just prior to the sheer to port causing the stranding (Rec. p. 491, Q. 89; p. 493, X-Qs. 110, 113). It is also borne out by the fact that the evidence of the helmsman, from whose statement the log (Canal Co. Exhibit 22) was made up, is to the effect that the *Bay Port* would not answer her helm (L. Maker, Rec. p. 580, X-Q. 154). The log made up at the time and the helmsman's statement are the best evidence of what actually happened. The man at the wheel ordinarily has the most vivid impressions of anybody of what takes place in connection with the action of his boat.

The Natchez, 78 Fed. 183.

The Sam Sloan, 65 Fed. 125.

With reference to the first shoal, at Station 242, the District Court found as a matter of fact as follows:

" . . . It does not seem to me, however, that the facts support this contention [that the shoal was the proximate cause of the first stranding]. . . . It does not seem to me that the condition of the canal there was such as to warrant a finding of negligence against the Canal Company for permitting the *Bay Port* to use the canal. The Canal Company was not at fault for the first stranding,

which appears to me to have been due either to pure accident, or to faulty navigation by the pilot" (Rec. p. 27).

With reference to the shoal at Station 193, the District Court found as a matter of fact that—

"About two thousand feet west of where the Bay Port finally landed, she passed over a shallow spot much like that above described in connection with the first stranding. There was everywhere on it, except close to the sides of the channel, twenty feet of water at mean low tide; and at the time of the accident,—the tide being about half up,—about three feet more, i.e., about twenty-three feet. It is contended by the owner of the Bay Port that the shoal caused her to sheer and was the proximate cause of the accident; and that the Canal Company is therefore liable. This shoal was farther from the place of the final accident than the first shoal was from the first accident. Throughout the intervening distance there was at least twenty-five feet of water at mean low tide. Two separate sheers were taken and broken after passing the shoal before the steamer finally struck. It seems to me that even if the shoal be regarded as a negligent obstruction in the canal, it was not the cause of the accident.

"From what has been said, it follows that the charges of negligence against the Canal Company by the Transportation Company have not been sustained, and that the libel against it must be dismissed" (Rec. pp. 30, 31).

The finding of fact of the Circuit Court of Appeals with reference to both shoals is as follows:

“The learned Judge of the District Court has found that, while there was a less depth of water than twenty-five feet near the places in the canal where the two strandings occurred, there were from twenty-one to twenty-two feet of water on the shoal over which the Bay Port passed before the first stranding and twenty-three feet or more on the shoal passed over by her before the second; and that, as her greatest draft was a little over eighteen feet, the contention of her owners that she ‘smelled the bottom’ and was caused to sheer by the shoal water was not sustained; and that, assuming that these shoals caused her to sheer, they were so far distant from the places where the vessel stranded, they were not the proximate cause of her stranding in either case, as she had passed the shoal before the first stranding by about 1,000 feet, and by about 2,000 feet before the second, and for the whole of each of these distances there was a depth of more than twenty-five feet of water in the channel. He has also found that the projection on the north bank of the canal did not reach into the channel of the canal and did not constitute any menace to navigation, that vessels constantly passed it in safety, and that the condition of the canal here did not warrant a finding of negligence against the Canal Company.

“We think these findings are sustained by the evidence. The grounds on which they are based are so fully stated in the careful opinion of the

learned District Judge that it is unnecessary to add anything to the reasons which he has given" (Rec. pp. 650, 651).

This is also repeated in its opinion upon the motion of the intervening petitioner to amend the decree (Rec. p. 670).

Both courts, therefore, concurred in the finding of fact that neither shoal was the proximate cause of either stranding; and, being based upon evidence amply sufficient to justify the finding, it ought not to be disturbed.

The Germanic (1905), 196 U.S. 589.

The Iroquois (1904), 194 U.S. 240, 247.

The Carib Prince (1898), 170 U.S. 655, 658.

Campania La Flecha v. Brauer (1897), 168 U.S. 104, 123.

The Circuit Court of Appeals therefore committed no error in not ruling as a matter of law that the shoals were the proximate cause of both strandings.

D.

The Circuit Court of Appeals did not err in not ruling as a matter of law that the first stranding was the proximate cause of the second stranding.

This contention has been disposed of in the argument directed to the previous assignment of error, the District Court and the Circuit Court of Appeals having concurred in the finding that the first stranding was not the proximate cause of the second stranding. Such finding, resting upon evidence more than sufficient to justify it, ought not to be disturbed.

E.

The Circuit Court of Appeals did not err in not ruling as a matter of law that the Canal Company to avoid liability must prove that said shoal spots not only did not cause, but could not have caused, the two strandings or either of them.

The Massachusetts statute providing for the construction of the canal provided that—

“said canal when constructed shall have a depth of not less than 25 feet at mean low water.”

The petitioner contends that at the time of the two strandings of the *Bay Port* there were shoal spots in the canal having less than said 25 feet, and that such was a violation of the Canal Company's statutory duty, which immediately threw upon the Canal Company, in order to avoid liability, the obligation of proving that such shoal spots not only did not cause or contribute, but could not have caused or contributed, to either stranding of the *Bay Port* (Petitioner's Brief, pp. 39, 54).

This rule, as set forth in the case of *The Pennsylvania*, 19 Wall. 125, applies only to statutes, ordinances, or rules covering the navigation of vessels, and intended to prevent collisions of vessels; it does not apply to such a statute as is here presented.

The case of *The Pennsylvania*, 19 Wall. 125, cited by the petitioner, involved a collision in a dense fog between the bark *Mary Troop* and the *Pennsylvania*, the *Troop* being under way without using her foghorn, “in plain violation of rules of navigation.” This

Court, in laying down the rule in such case, at page 136, said:

“But when, as in this case, a ship at the time of a collision is in actual violation of a statutory rule intended to prevent collisions, it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributory cause of the disaster. In such a case the burden rests upon the ship of showing not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been.”

The case of *The Selja*, 243 U.S. 291, also cited by the petitioner, involved a collision in a fog between the steamers *Selja* and *Beaver*. The *Selja*, upon hearing the fog signal of the *Beaver*, did not stop her engines, in violation of article 16 of the Act of Congress of August 19, 1890, applying to the international regulations for preventing collisions at sea.

The case of *The Thielbek*, 241 Fed. 209, also cited by the petitioner, involved a collision between the steamer *Fagelund* and the bark *Thielbek*, which was being towed. The *Fagelund*, at the time having the tow on its starboard side and approaching it obliquely, attempted to cross the bow of the tow, in violation of rule 7 of the pilot rules.

The case of *The Ellis*, 152 Fed. 981, also cited by the petitioner, involved a collision between the steamers *Ellis* and *Galicia*. The *Ellis*, going down a western river gave the first passing signal, in violation of rule 1 governing pilots on western rivers, which provided

that the pilot of the ascending steamer should give the first passing signal.

The case of *The Dauntless*, 121 Fed. 420, also cited by the petitioner, involved a collision between the *Dauntless* going down a river and two steam launches going up. The *Dauntless* attempted to pass them near the left bank of the river, in violation of article 25 of the Act of Congress, June 7, 1897, "for preventing collisions upon certain harbors, rivers, and inland waters of the United States," providing that a vessel situated as was the *Dauntless* should keep to the right side of the river.

All the cases cited by the *Bay Port's* owner, therefore, fall into that class of cases in which a rule of navigation intended to prevent collisions of vessels is violated by a vessel, such as—

- (1) The International Rules of Navigation (29 Stat. 885) for preventing collisions, "to be followed by all public and private vessels."
- (2) The Inland Rules (30 Stat. 96) for preventing collisions, "to be followed by all vessels navigating all harbors, rivers, etc."
- (3) The Lake Rules (28 Stat. 645) for preventing collisions, "to be followed by all public and private vessels."
- (4) The Mississippi Valley Rules (Rev. Stat. sec. 4233) for preventing collisions, "to be followed by vessels of the navy and of the mercantile marine."

It is therefore only a violation by a "vessel" of these rules "intended to prevent collisions" that places upon

such offending "vessel" the burden of proving that such violation not only did not contribute, but could not have contributed, to the collision. The rule does not apply to other statutes, which do not in any way involve vessels or their navigation. The statute providing for the construction of the canal and its depth upon completion does not, therefore, fall within the rule of *The Pennsylvania*.

In the case of the canal statute here involved the usual test is to be applied, viz., if a statute has been violated by a defendant, did such violation constitute the proximate cause of the injury?

"The mere fact that the plaintiff, on the one hand, or the defendant on the other, was engaged in violating the law in a given particular at the time of the happening of the accident, will not bar the right of action of the former, nor make the latter liable to pay damages, unless such violation of law was an efficient cause of the injury."

Thompson, Commentaries on the Law of Negligence (1901), sec. 82 (and cases cited).

Lane v. Atlantic Works (1872), 111 Mass. 136, 140.

Newcomb v. Boston Protective Dept. (1888), 146 Mass. 596, 604.

Field v. Gowdy (1908), 199 Mass. 568, 573.

Todd v. Traders & Mechanics Ins. Co. (1918), 230 Mass. 595, 598.

See also *Phil., W. & B. R.R. Co. v. P. & H. deG. S. T. Co.* (1859), 23 How. 209, 217, 218.

Boston & Maine R.R. v. Hooker (1913), 233
U.S. 97, 151, 152.

The evidence upon the matter of this statute, which is uncontradicted, is to the effect that the canal when completed did have a depth of 25 feet at mean low water (which was a full compliance with the provisions of the statute), and that any shallower depths at the time of the *Bay Port's* stranding were the results of shoaling (a natural phenomenon) after the terms of the statute had been complied with, and did not, therefore, constitute a violation of the statute (Belmont, Rec. p. 637, X-Qs. 33-35).

In any event, whether the canal statute was violated or not, both the District Court and the Circuit Court of Appeals concurred in the affirmative finding that neither of the shoal spots complained of by the petitioner was the proximate cause of either of the two strandings of the *Bay Port* (Rec. pp. 27, 30, 31, 650, 651). The Circuit Court of Appeals therefore committed no error in not applying the rule contended for by the petitioner.

F.

The Circuit Court of Appeals did not err in holding the owner of the Bay Port at fault for allowing the Bay Port to proceed through the canal after she came afloat on December 14, 1916.

1. THE OWNER, BY ITS AGENTS OR EMPLOYEES, WAS NEGLIGENT IN NOT HOLDING THE BAY PORT IN DEEP WATER, AT OR NEAR THE POINT WHERE SHE SLID OFF THE BANK, UNTIL SHE WAS PUMPED OUT, MADE SEAWORTHY, AND FIT TO COMPLETE THE NAVIGATION OF THE CANAL.

(a) *The master of the Bay Port does not escape responsibility for the safety of his ship, and for the determination to proceed through the canal, merely because Pilot Lewis was on board.*

In the situation which existed after she floated, the responsibility was entirely that of the owner, through its captain. In the emergency which arose, the captain, being on the ship, could not escape his responsibility for the safety of his vessel, or for the determination of what measures should be taken under the circumstances. The only reply of the owner by way of evidence is the suggestion that the responsibility was that of Pilot William Lewis, inasmuch as he was present and did in fact advise the captain, or gave orders as to what should be done.

It is very well settled, however, that, although the master of a ship may be relieved to some extent, in relation to the navigation of the vessel, by the presence of a pilot, he having a right to assume that the pilot has special knowledge in relation to the course to steer, the waters to be navigated, etc., yet, where there is an emergency and when the question is not one of navigation (that is, a question as to one or more directions to

follow), and where an exercise of judgment is required to determine primarily whether to begin navigation or not, the presence of a pilot does not relieve the captain of the responsibility for that determination. The pilot's responsibility does not apply until navigation under his control is begun, and applies only to the "navigation." If the decision arrived at is a mistake, and the course pursued for the safety of the ship is an improper course, the master cannot relieve himself of responsibility by saying that the pilot suggested or assented to it.

At pages 231, 232, of Marsden's *Collisions at Sea* (6th ed. 1910), it is stated that—

"Although the pilot's authority is paramount, it has already been stated that neither the Owners nor the master are entirely free from responsibility; 'there are many cases in which there are certain duties he (the master) has to discharge, notwithstanding there is a pilot on board, for the benefit of the owners.'"

"In accordance with this principle, the following are duties of the master and crew for which the owners are held responsible, notwithstanding the presence on board of a compulsory pilot. . . . The master is responsible for the sufficiency and power of a tug employed for ordinary towage service, and for the employment of a tug where the assistance of a tug is necessary; . . . he is generally responsible for the ordinary work of the ship being properly carried on, and for usual precautions being taken without express order from the pilot. For the trim of the ship, and gen-

erally for her sufficiency as regards tackle and equipment for ordinary purposes of navigation, the owner or master is responsible."

At pages 234, 235:

"In addition to the responsibility which attaches to the owners, though a compulsory pilot be on board, in respect of the proper equipment of the ship, and of certain acts of seamanship, as, for instance, in keeping a good look-out, a responsibility also rests on the master in case of an emergency, or where a reasonably prudent seaman would have taken some action, or have called the attention of the pilot to some fact. Neglect of such action by the master may place liability on the owners."

In the case of *The Oregon* (1895), 158 U.S. 186, at pages 194, 195 (cited by the Circuit Court of Appeals), which was a case of collision, it was held in part:

"Nor are we satisfied with the conduct of the master in leaving the pilot in sole charge of the vessel. While the pilot doubtless supersedes the master for the time being in the command and navigation of the ship, and his orders must be obeyed in all matters connected with her navigation, the master is not wholly absolved from his duties while the pilot is on board, and may advise with him, and even displace him in case he is intoxicated or manifestly incompetent. He is still in command of the vessel, except so far as her navigation is concerned, and bound to see that there is a sufficient watch on deck, and that the

men are attentive to their duties. *The Iona*, L. R. 1 P. C. 426.

"In *The Batavier*, 1 Spinks, 378, 383, it was said by Dr. Lushington: 'There are many cases in which I should hold that, notwithstanding the pilot has charge, it is the duty of the master to prevent accident, and not to abandon the vessel entirely to the pilot; but that there are certain duties he has to discharge (notwithstanding there is a pilot on board) for the benefit of the owners.' In an official report made by a maritime commission in 1874, the Elder Brethren of Trinity House are said to have expressed the opinion 'that in well-conducted ships the master does not regard the presence of a duly licensed pilot in compulsory pilot waters as freeing him from every obligation to attend to the safety of the vessel; but that, while the master sees that his officers and crew duly attend to the pilot's orders, he himself is bound to keep a vigilant eye on the navigation of the vessel, and, when exceptional circumstances exist, not only to urge upon the pilot to use every precaution, but to insist upon such being taken.' "

(b) *The Bay Port* was not held by the tugs in deep water, at or near the point where she slid off the bank, until she was made seaworthy and fit to navigate the canal.

Practically all of the witnesses agreed that there was no reason why the *Bay Port*, when she floated off, could not have been held at that spot by the tugs and by reversing her engine, until the water was pumped out, and she was rendered fit for the further navigation

of the canal (A. J. Davis, Rec. p. 440, Qs. 19, 25; Shelton, Rec. p. 552, X-Q. 241).

It is to be noted that no error was assigned by this petitioner before the Circuit Court of Appeals to the following finding of the District Court:

“The day before, under much safer conditions both of current and of trim, the *Bay Port* had been unable to go through safely. It is evident that a great mistake was made in supposing that it was safe to renew the attempt under the conditions existing when she came off the bank” (Rec. p. 32).

It is also beyond any dispute that the *Bay Port*, when she came off, was not in a fit condition to attempt to navigate the canal. She came off the bank before she had been entirely pumped out. On Captain Hammett's own evidence the water, as he put it, was a foot over the cargo in the forward part of the boat (Rec. p. 532, X-Qs. 457, 458). She was down at the head 18 inches (Hammett, Rec. p. 510, Q. 169; pp. 532, 533, X-Qs. 464-474), and 30 inches, according to Pilot W. T. Lewis (Rec. p. 205, Q. 67). She listed to port about 15 inches, according to Captain Hammett (Rec. p. 531, X-Q. 450), and 24 inches, according to Pilot W. T. Lewis (Rec. p. 205, Q. 67). The man at the wheel on both days stated that the *Bay Port*, after she came off, drifted for a third of a mile down the canal, out of control (L. Maker, Rec. p. 576, X-Qs. 103-105). Pilot Lewis testified that she sheered and drifted from side to side, and was never under control from the time she floated until the time she struck (Rec. p. 207, Qs. 85-89); and also, in cross-examination,

that, in the *Bay Port's* then condition, the canal was not wide enough for her to go through (Rec. p. 227, X-Q. 332). Clearly, the *Bay Port* was in no condition to navigate the canal, and it was negligent to attempt it.

All the witnesses testifying upon the point stated that the tugs could have held her in position in deep water indefinitely, until she could be pumped out and made ready to navigate the canal (Scott, Rec. pp. 369, 370, Qs. 110-114; p. 372, X-Qs. 127-130; Robbins, Rec. pp. 457, 458, Qs. 17-21; J. Kemp, Rec. p. 388, Statement to Court; B. Kemp, Rec. p. 461, Qs. 11-14, all witnesses offered by the Scott Co.; and Timmans, Rec. p. 542, Qs. 22, 23, offered by the owner).

Captain Hammett testified upon this point as follows:

"X-Q. 445. Captain, would it have been possible to have held the boat in the deep water when she came off, with the aid of the tugs or otherwise, before starting down the canal? A. I think it might have been if we had wanted to.

"X-Q. 446. That could have been done if you had wanted to do it, could it not? A. If we had wanted to do it, probably" (Rec. p. 531).

Captain Scott, of the Scott Company, on cross-examination, in reply to a question as to what precautions were taken to care for the *Bay Port* in the event of her floating, testified: "the canal tugboats were there to take care of her if she floated; that was their business, and we looked to them to do it" (Rec. p. 377, X-Q. 188). And again, he testified that the tugs should

be so placed as to be quickly available in the event of her floating (Rec. p. 380, X-Qs. 217-219).

J. Kemp, a Scott Company witness, testified that the tugs should be ready to be made use of immediately (Rec. p. 383, Q. 26); and again:

"If I was in charge of the wrecking expedition, I should have found out if there was sufficient water to go on with the ship, before I should decide on anything . . . in the meantime, the ship should be held in position by the pilot and tugs who have control of the ship," by means of the tugs making fast to her (Rec. pp. 384, 385, X-Qs. 37-47).

The witness Timmans, offered by the owner, testified:

"I would have my tugboats around me, if I had control of it, so that when I got ready to pump my boat I could take care of her in any condition she might be in, rather than leave her on the beach" (Rec. p. 540, Q. 9). He also testified that he would have got her into deep water, and would "be sure to have enough of them [tugs] to take care of her . . . the tugboats should have been right there to take care of her . . . and these three tugboats would have held her in position where she couldn't drift ashore" (Rec. pp. 540, 541, Qs. 9-16).

In spite of this manifest duty, and in spite of the fact that the tide had been running east for over four hours (*Bay Port* Exhibit 8), the tugs *Hazelton* and *Dalzelline* were hanging onto the bow of the *Bay Port* by lines, and carried away from her by the tide. None of the tugs was prepared, or properly placed, ade-

quately to handle the *Bay Port* when she floated. None of them attempted to hold her in deep water at or near the point where she floated. The *Hazelton* and *Dalzelline* turned around to catch her after she had floated off. The *Stuart* pulled the *Salvor* westerly. But according to J. Kemp, the most important thing to do was for the *Stuart* to shift to the *Bay Port's* stern and get a hawser on her to steady her (Rec. p. 393, X-Qs. 132-135). Another Scott Company witness, Davis, also testified that there should have been a tug at the *Bay Port's* stern as an anchor, to hold her in position if she came off, and until the other tugs could get in position to handle her; that the *Stuart*, if she was outside the *Salvor*, was not in a proper position so to hold her when she floated (Rec. pp. 446, 447, X-Qs. 68-76, Qs. 79, 80), for in such position it would take her twenty minutes to get to the *Bay Port's* port quarter, and to get a line to her (Rec. p. 448, Qs. 79, 80).

In that situation, with the *Bay Port* in her then condition, there being no reason why she could not be held at the point where she floated until she was put in proper condition to navigate the canal, it is submitted that beyond question the determination to start her engines full speed ahead (Hammett, Rec. p. 530, X-Q. 435) and to attempt to navigate the canal were negligent.

(c) *Any understanding as to taking the Bay Port to Sandwich in the event of her floating was not participated in by the Canal Company, and it is not affected thereby.*

When asked as to any orders which Joseph Lewis gave at the time the ship came off as to taking her to

Sandwich, Captain Hammett made the suggestion that it had been generally understood that after she floated she should be taken to Sandwich, and tied up there (Rec. p. 528, X-Q. 408); but, when asked as to who understood it that way, he replied: "Why, generally understood. I think that was talked over, that if she floated, I would take her down and tie her up at Sandwich" (Rec. p. 528, X-Q. 409). This clearly shows that, if any decision was reached, it was that Hammett was to take her to Sandwich. He further testified that the taking her to Sandwich was based upon the assumption that she would be previously pumped out (Rec. p. 539, X-Qs. 518-520), so that she would be in proper condition to navigate the canal. If this so-called agreement amounts to anything at all, its effect, so far as going to Sandwich is concerned, is negatived, because it was based entirely upon the assumption that the *Bay Port* would be put in a proper condition to navigate the canal.

But any such understanding that Captain Hammett might have had did not affect the Canal Company, for it was not a party to it. Even Captain Hammett, the only witness testifying to any such understanding, stated that it was talked over by Captain Joseph Lewis, Pilot Lewis, possibly Mr. Gardner of the Scott Company, and himself (Rec. p. 528, X-Q. 411). Pilot Lewis denied that he took part in any such conference (Rec. p. 610, Q. 398); but, admitting for the purpose of argument that he did, this cannot bind the Canal Company. Pilot Lewis was not its agent, and, if it was intended that he should complete Pilot Rochester's task of piloting the *Bay Port* through the canal, the agreement was,

as on December 13, one of pilotage between the owner and the pilots.

Mr. Gardner, who testified, did not corroborate Captain Hammett in this. Captain Geer, the canal superintendent, who testified before and after Captain Hammett, did not corroborate any such statement. He testified on direct examination that after he had turned over the tugs to Joseph Lewis on December 13, and had left the scene, he did not go near the *Bay Port* again until after she sank. He did not testify that any such agreement was made by or for him, and after he left there was nobody representing the Canal Company who could make such an agreement.

Undoubtedly, then, this was an afterthought of Captain Hammett to justify himself in proceeding to navigate the canal, no other justification being offered.

(d) Captain Hammett neglected to make the Bay Port fast to dolphins 1000 feet east of where she floated, until she could be made seaworthy.

Captain Hammett, after discovering the condition of his vessel, passed a set of dolphins, to which the *Bay Port* could have been made fast by the tugs. The testimony as to these dolphins was in part as follows: The dolphins were about 800 to 900 feet east of where the *Bay Port* slid off the bank (B. Kemp, Rec. p. 462, X-Qs. 24, 25). This witness, B. Kemp, called by the Scott Company, testified that, if he were master of this vessel under the circumstances, he would act as indicated in the following testimony:

“X-Q. 24. Yes. A. In regards to the proceeding, I should have seen the stability of the ship,

whether she was by the head, on an even keel or by the stern. If the tide had been running so fast that we thought we couldn't steer her,—if she had been so that you could proceed in the usual way, you could proceed through the canal,—I should have dropped her down to the next dolphins, which was a matter of eight or nine hundred feet, and waited until the tide slacked up, if the tide was running so fast at that time. If I had found the ship was manageable, I should place the tugboats and proceed through the canal.

“The Court. Were the dolphins between the place where she came off and the place where she finally was at rest?

“Mr. Pillsbury. I so understand.

“The Witness. Yes, sir; on the north bank.

“X-Q. 25. About how far down? A. I should say from the testimony I have heard, from where she struck a matter of—oh, perhaps a thousand feet, perhaps a little more” (Rec. p. 462).

The witness A. J. Davis, called by the Scott Company, stated that, if he were master, he would have trusted to the local knowledge of the pilot and tugs to help him out, and put him in a more suitable position to get the water out so she would be in a seaworthy condition (Rec. p. 445, X-Qs. 54-59). If she had been made fast to the dolphins, she could have been pumped out at leisure, and rendered fit for navigation, and it was the duty of those in charge to tie her up at the dolphins for that purpose. Captain Hammett did not deny that this was a practical measure of safety (Rec. p. 512, Q. 192).

The District Court found that—

“The courses open when the Bay Port floated were, either to hold her in the channel where she came off, by tugs, or to drop her down to some dolphins and tie her there for the time being,—both of which, it seems clear, could have been done,—or to take her on through the canal” (Rec. p. 29).

“The sudden and unexpected floating of the steamer and her being caught by the current in the narrow channel created a serious emergency” (Rec. p. 30).

And also—

“... It is evident that a great mistake was made in supposing that it was safe to renew the attempt under the conditions existing when she came off the bank” (Rec. p. 32).

And again—

“The failure to tie up at the dolphins which were passed before the accident seems hard to justify on the evidence before the court. They were reached after the first crisis of the emergency had gone by, and there had been time to consider what should be done. With the help of the tugs and her own engines the Bay Port could easily have been placed at them” (Rec. p. 33).

The Circuit Court of Appeals found that—

“While there was evidence that Superintendent

Geer gave instructions on the night of December 13th to get her through the canal as quickly as possible, this instruction did not authorize an attempt to get her through in the condition in which she was after she floated" (Rec. p. 65³).

"We do not think any sudden emergency arose when she slid off the bank which was of such a character as to excuse her master from exercising the judgment which the law exacts from a master who has in his charge a valuable ship and cargo, and which would authorize him to surrender the command of his ship in her condition to a pilot upon whose skill in navigation only he was to depend. He was not confronted with imminent danger, although his vessel was caught by the current and began to drift with it. There were three tugs at her side with steam up and all of the witnesses, including Captain Hammett, testified that it would have been possible for these tugs to hold her in the channel of the canal in deep water or to place her at the dolphins which were only about 1,000 feet to the eastward, until she could be pumped out and her cargo adjusted, so that she might be in better condition to undertake the passage of the remainder of the canal" (Rec. p. 653)

And further that—

"We think that Captain Hammett was justified in assuming that Lewis was to complete the pilotage of the Bay Port through the canal, as Rochester, the pilot of the previous day, was not present; but Lewis' duties related only to pilotage

through the canal. The question of determining whether the vessel was in proper condition for navigation was not for his decision, however, but for that of Captain Hammett alone; and even with the pilot in command of the navigation of the vessel, it has been held that the captain is not to leave the whole responsibility to him" (Rec. p. 654).

And again—

"The mate of the tug boat also testified that the Bay Port sheered 'practically as soon as she got afloat.' It is evident that a vessel of her type, in the condition in which she was, would steer badly; and this fact must have been known to Captain Hammett. Looking at the situation as it is presented by the evidence and not in the light of subsequent events, we think that he was negligent in allowing his vessel to proceed before she was pumped out and her cargo adjusted. The tide was rising and in about two hours would have been high, when there would have been slack water in the canal and its navigation made safer for a vessel of the Bay Port's type" (Rec. p. 657).

This was repeated by the Circuit Court of Appeals in its later opinion (Rec. pp. 670, 671).

In view of the fact that the District Court found that the taking of the vessel through the canal was a "great mistake," and the failure to tie up at the dolphins hard to justify, which is not inconsistent with the finding of the Circuit Court of Appeals that such course of action was negligent, there being plenty of

evidence to justify this finding of fact, it ought not to be disturbed.

G.

The Circuit Court of Appeals did not err in not ruling as a matter of law that the decision so to proceed was an error in extremis.

As appears from the evidence hereinbefore quoted, practically all the witnesses agreed that the *Bay Port* when she floated could have been held at that spot by the tugs or tied to dolphins until the water was pumped out. Captain Hammett, from his long experience as a navigator, must have known, and from his testimony did know, this long before the *Bay Port* came afloat (Rec. p. 531, X-Qs. 445-446).

Captain Hammett must also have known in advance that, if the *Bay Port* should come afloat before she was entirely pumped out and her cargo retrimmed, she would not be in a fit condition to navigate the canal, as she was not, upon Captain Hammett's own testimony (Rec. pp. 510, Q. 169; p. 531, X-Q. 450; pp. 532, 533, X-Qs. 457, 458, 464-474).

Allowing twelve and a half hours for an ebb and flow of the tide, which is more than enough, when the *Bay Port* struck, December 13, 1916, the tide had ebbed since 11.50 a.m., or for two hours and twenty-five minutes, leaving three hours and fifty minutes of tide, so to speak. When she floated on December 14, 1916, the tide had flowed since 6 a.m., or for four hours and fifteen minutes, creating that amount of tide (*Bay Port* Exhibit 8). Therefore, if she struck on three hours and fifty minutes of tide, Captain Hammett should at least have anticipated her coming afloat at

a similar stage of the tide, which, on December 14, would have been 9.50 a.m., or twenty-five minutes before she actually did float.

That he should have anticipated such event is further borne out by the fact that about 7.30 p.m. on December 13, 1916, it was thought that the *Bay Port* had moved, the tide at this time having flowed in for about two hours. Captain Joseph Lewis on this occasion called to the *Stuart* to "watch her close, and to keep working on her" (Canal Co. Exhibit 24).

The witness Lecompte testified that about 9.30 to 10 a.m., or about one-half hour before the *Bay Port* floated, he mentioned to Joseph Lewis that it was a pretty strong tide to go through with the *Bay Port*, and that Joseph Lewis replied: "We have got three powerful tugboats . . . we will hold her" (Rec. pp. 241, 242, Qs. 83-86). This is corroborated by the witness Donnelly (Rec. pp. 267, 268, Qs. 38-41), and is not controverted by the owner. Joseph Lewis and Captain Hammett, therefore, were warned of the dangers, and appreciated the only method of overcoming them, and yet failed to adopt such measures.

Captain Hammett, in direct examination, in reply to a question as to whether he would have pursued the same course even if he had known of the existence of any shoal further east showing from 19 to 20 feet of water, testified that such a matter would not have affected his course of action, even if he had known about it (Rec. pp. 511, 512, Qs. 188-191).

Clearly, then, Captain Hammett, as master of the vessel, had plenty of opportunity before the *Bay Port* came afloat to determine his course of action. Even after she came afloat, he had ample time to observe

the condition of the *Bay Port* and to decide not to navigate the canal. His testimony bearing upon his opportunity to discover the *Bay Port's* condition after she floated was in part as follows:

“Q. 169. And how was she as to being by the head when she came off? A. Well, I presume she might have been 18 inches; I am not positive of that, of course; I can't tell only judging by my eye” (Rec. p. 510).

While Captain Hammett said that there was no difficulty in steering, and that the *Bay Port* went “first rate,” Pilot Lewis testified upon this point in part as follows:

“Q. 85. Was the *Bay Port*, from the time she went off the bank as you have described up to the time she struck, under control? A. No, sir.

“Q. 86. Will you describe a little more in detail what her conduct was from the time she went off until she struck in the way you have indicated? A. Why, she was continually sheering and drifting from one side to the other; she had no headway to amount to anything excepting the drift of the tide” (Rec. p. 207).

The witnesses Lecompte, Donnelly, and Wagner also testified that from the time she floated until she stranded she was sheering practically all the time (Lecompte, Rec. p. 238, Qs. 48-50; Donnelly, Rec. p. 268, Q. 45; Wagner, Rec. p. 280, Q. 38).

Apart from the question of how the *Bay Port* acted, it is clear that Captain Hammett had time to observe,

and did observe, that the *Bay Port* was down by the head 18 inches, and was logier than the day before, and that, in spite of these observations, he determined to go on and would have made the same determination even if he had known there was only 18 to 20 feet of water in the canal (Hammett, Rec. pp. 511, 512, Qs. 188-190).

Captain Hammett, knowing the condition of his vessel, also neglected to tie her up to the dolphins, which would have given an opportunity to pump her out and retrim her cargo.

Captain Hammett testified upon this point as follows:

"Q. 192. . . . In your judgment, was it safe or practical to have attempted to tie up in the canal at those dolphins that you passed by at that time?

A. Whether it would have been practical, I wouldn't say" (Rec. p. 512).

The District Court found as a matter of fact, to which no error was assigned in the petitioner's appeal to the Circuit Court of Appeals—

"The courses open when the *Bay Port* floated were, either to hold her in the channel where she came off, by tugs, or to drop her down to some dolphins and tie her there for the time being,—both of which, it seems clear, could have been done,—or to take her on through the canal" (Rec. p. 29).

And again—

"The failure to tie up at the dolphins which were passed before the accident seems hard to

justify on the evidence before the Court. They were reached after the first crisis of the emergency had gone by, and there had been time to consider what should be done. With the help of the tugs and her own engines the Bay Port could easily have been placed at them" (Rec. p. 33).

As the District Court said in its finding, the stress of any emergency had passed. The master, in command of his ship, and bound to take all reasonable precautions to preserve it, must have known of the unseaworthiness and unmanageability of the vessel by this time. The fact that a pilot was on board or that any understanding might previously have been reached to take her to Sandwich does not justify this failure. It was his obligation to supersede the pilot, stop navigation, and tie his vessel up if necessary.

The Circuit Court of Appeals found as a matter of fact—

"We do not think any sudden emergency arose when she slid off the bank which was of such a character as to excuse her master from exercising the judgment which the law exacts from a master who has in his charge a valuable ship and cargo, and which would authorize him to surrender the command of his ship in her condition to a pilot upon whose skill in navigation only he was to depend. He was not confronted with imminent danger, although his vessel was caught by the current and began to drift with it. There were three tugs at her side with steam up and all of the witnesses, including Captain Hammett, testified that it would

have been possible for these tugs to hold her in the channel of the canal in deep water, or to place her at the dolphins which were only about 1,000 feet to the eastward, until she could be pumped out and her cargo adjusted, so that she might be in better condition to undertake the passage of the remainder of the canal" (Rec. p. 653).

"We think that Captain Hammett was justified in assuming that Lewis was to complete the pilotage of the Bay Port through the canal, as Rochester, the pilot of the previous day, was not present; but Lewis' duties related only to pilotage through the canal. The question of determining whether the vessel was in proper condition for navigation was not for his decision, however, but for that of Captain Hammett alone; and even with the pilot in command of the navigation of the vessel, it has been held that the captain is not to leave the whole responsibility to him" (Rec. p. 654).

"It is evident that a vessel of her type, in the condition in which she was, would steer badly; and this fact must have been known to Captain Hammett. Looking at the situation as it is presented by the evidence and not in the light of subsequent events, we think that he was negligent in allowing his vessel to proceed before she was pumped out and her cargo adjusted. The tide was rising and in about two hours would have been high, when there would have been slack water in the canal and its navigation made safer for a vessel of the Bay Port's type" (Rec. p. 657).

“It is quite true that negligence must be determined upon the facts as they appeared at the time and not by a judgment from actual consequences which then were not to be apprehended by a prudent and competent man. . . . But it is a mistake to say . . . that if the man on the spot, even an expert, does what his judgment approves, he cannot be found negligent.”

The Germanic (1905), 196 U.S. 589.

The District Court having found that Captain Hammett's navigation of the canal and passing by the dolphins was “hard to justify,” and the Circuit Court of Appeals having found that the same was negligent, the findings are not inconsistent, but both Courts rather concurred in the finding that such determination of Captain Hammett was not an error *in extremis*. The finding of the Circuit Court of Appeals ought not, therefore, to be disturbed.

IV.

CONCLUSION.

The power of the Court to issue certiorari will be sparingly exercised, and only when the circumstances of the case satisfy the Court—

“that the importance of the question involved, the necessity of avoiding conflict between two or more Courts of Appeal, or between Courts of Appeal and the courts of a State, on some matter affecting the interests of this nation in its internal or external relations, demand such exercise.”

Forsyth v. Hammond (1897), 166 U.S. 506,
514.

Hamilton Shoe Co. v. Wolf Bros. (1916),
240 U.S. 251, 258; and cases cited.

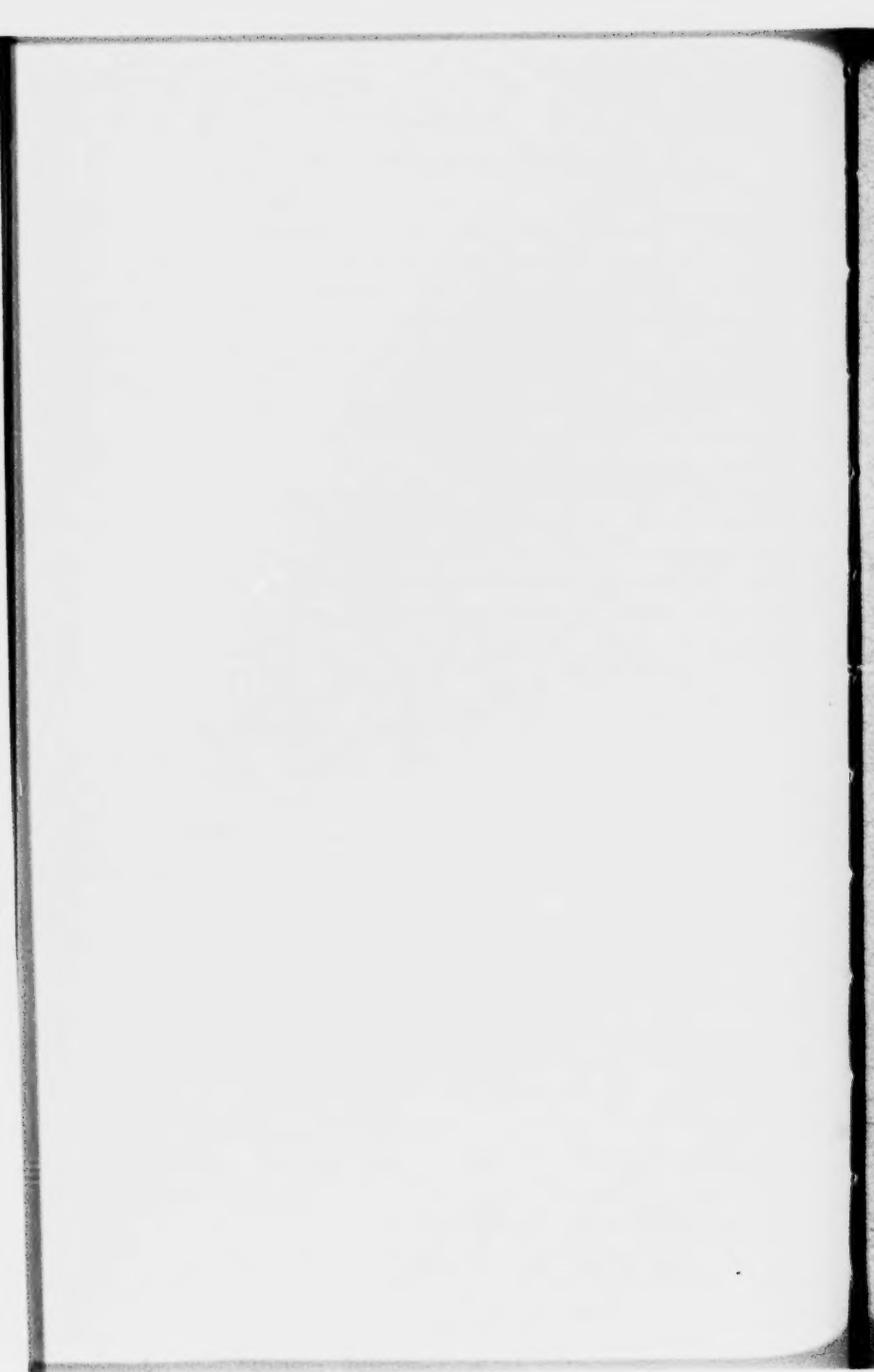
None of the elements above outlined as sufficient reasons for the issue of the writ of certiorari are present in these cases. The alleged errors of the Circuit Court of Appeals assigned by the petitioner as reasons for filing the petition for certiorari are not substantiated by the records in the two cases, nor by the law applicable to them, and do not, therefore, support the petitioner's contentions.

The respondent respectfully submits, therefore, that the petition for certiorari should be dismissed.

Respectfully submitted,

WILLIAM R. SEARS,

Counsel for Respondent.



SEP 29 1920

JAMES D. MAHER,
CLERK

116 121
Nos. ~~487~~ & ~~487~~

Supreme Court of the United States

October Term, 1920.

WHITE OAK TRANSPORTATION COMPANY,

Petitioner,

against

THE BOSTON, CAPE COD & NEW YORK CANAL
COMPANY,

Respondent.

WHITE OAK TRANSPORTATION COMPANY,

Petitioner,

NORTHERN COAL COMPANY,

Intervening Petitioner,

against

THE BOSTON, CAPE COD & NEW YORK CANAL
COMPANY,

Respondent.

BRIEF FOR T. A. SCOTT CO. INC.

SAMUEL PARK,
Counsel for T. A. Scott Co., Inc.

Supreme Court

OF THE UNITED STATES.

October Term, 1920.

WHITE OAK TRANSPORTATION
COMPANY,
Petitioner,

against

THE BOSTON, CAPE COD & NEW
YORK CANAL COMPANY,
Respondent.

WHITE OAK TRANSPORTATION
COMPANY,
Petitioner,
NORTHERN COAL COMPANY,
Intervening Petitioner,
against

THE BOSTON, CAPE COD & NEW
YORK CANAL COMPANY,
Respondent.

**Brief for T. A. Scott Company, Inc.,
Impleaded in the above entitled
libels by the Boston, Cape Cod
& New York Canal Company, un-
der Admiralty Rule 59.**

On December 13, 1916, Captain Joseph Lewis,
who was wrecking master at Boston for the T.

A. Scott Company, Inc., was informed by Mr. Freeman of the firm of Crowell & Thurlow, operating agents of the steamship BAY PORT, that the steamship BAY PORT was in trouble in the canal and was requested to take, if possible, the 4:30 train from Boston to Buzzards Bay. Captain Lewis replied that he would leave on that train. There was no further conversation relative to the engagement of the respondent (Record p. 16, answer to interrogatory sixth).

The T. A. Scott Company, Inc., was and had been for many years engaged in salvage operations on the Atlantic Coast; and maintained a plant at Boston. The small lighter SALVOR, with some wrecking paraphernalia was dispatched from Boston that evening for the canal, in tow of a steam tug. Captain Joseph Lewis arrived at the canal during the evening and with the aid of a diver discovered a hole upon the starboard side of the BAY PORT below the water line. On the following morning, about five o'clock, a diver plugged up the hole on the starboard side. It was believed by everyone connected with the ship or the salving thereof that it would be impossible to remove the BAY PORT from the bank without first removing part of her cargo. Captain Joseph Lewis was upon the SALVOR when the BAY PORT suddenly slid off the bank. Captain Hammett of the BAY PORT was upon her bridge and pilot William Lewis, a canal pilot, stood beside him. Neither the Scott Company nor any of its representatives had anything to do with the navigation of the BAY PORT. After the BAY PORT stranded the second time and became a total loss, the Boston, Cape Cod & New York Canal Company filed a libel against

the White Oak Transportation Company as owner of the BAY PORT alleging faults as stated in the record, and also filed a separate libel against the T. A. Scott Company, Inc., for damages alleged to have been sustained by reason of the negligence of the T. A. Scott Company, Inc.

In the libel filed by the White Oak Transportation Company against the Boston, Cape Cod & New York Canal Company, the respondent, the said Canal Company brought in the T. A. Scott Company by petition under Admiralty Rule 59, alleging as faults against said Scott Company the same allegations of fault as alleged by the said Canal Company against the Scott Company. The allegations were that the defendant T. A. Scott Company, Inc., through its agents, assumed charge of the BAY PORT and negligently cared for the said steamer while she was resting on the bank subsequent to the accident of December 13th, and negligently suffered the said steamer to slide off the bank at a time when the defendant was at fault in not being prepared to complete the navigation of the canal by the BAY PORT, as the result of which she sank in the canal; and in that the defendant T. A. Scott Company, Inc., after assuming charge of the BAY PORT subsequent to the accident of December 13th negligently permitted the BAY PORT to become afloat in the said canal in an unsafe condition for navigation, and negligently failed to be prepared to complete the passage through the canal by the BAY PORT, as a result of which she sank in the canal.

Upon the trial of the issues, the District Judge held, as respects the T. A. Scott Company, Inc., "When she floated, it immediately surrendered her

to her master and pilot, who accepted her without objection; thereafter, it exercised no control over her movements. No sufficient reason appears for holding it at fault in any respect." (Record, p. 31, middle of page).

Upon appeal to the United States Circuit Court of Appeals, the decision of the District Judge, as respects the T. A. Scott Company, Inc., was affirmed.

Neither the White Oak Transportation Company, petitioner, nor the Northern Coal Company, intervening petitioner, makes allegations of fault against the Scott Company. The only allegations of fault made against the Scott Company were made by the Boston, Cape Cod & New York Canal Company. No petition for writ of *certiorari* to the United States Circuit Court of Appeals for the First Circuit has been noticed by the Boston, Cape Cod & New York Canal Company in its suit against the T. A. Scott Company, Inc. In the event of the petitions of the White Oak Transportation Company and the Northern Coal Company being granted, it is respectfully submitted that the T. A. Scott Company, Inc. is not a necessary party to further litigation.

It is respectfully submitted that if the petitions should be granted, and writs of *certiorari* issued, as prayed for, the said writs should exclude the T. A. Scott Co., Inc.

PARK & MATTISON,
Proctors for T. A. Scott
Company, Inc.

SAMUEL PARK,
Of Counsel.

JAN 20 1922

W. R. SPANSDURY

CLERK

Supreme Court of the United States.

October Term, 1921.

No. 116.

**WHITE OAK TRANSPORTATION COMPANY,
PETITIONER,**

v.

**BOSTON, CAPE COD & NEW YORK
CANAL COMPANY,
RESPONDENT.**

No. 124.

**NORTHERN COAL COMPANY,
PETITIONER,**

v.

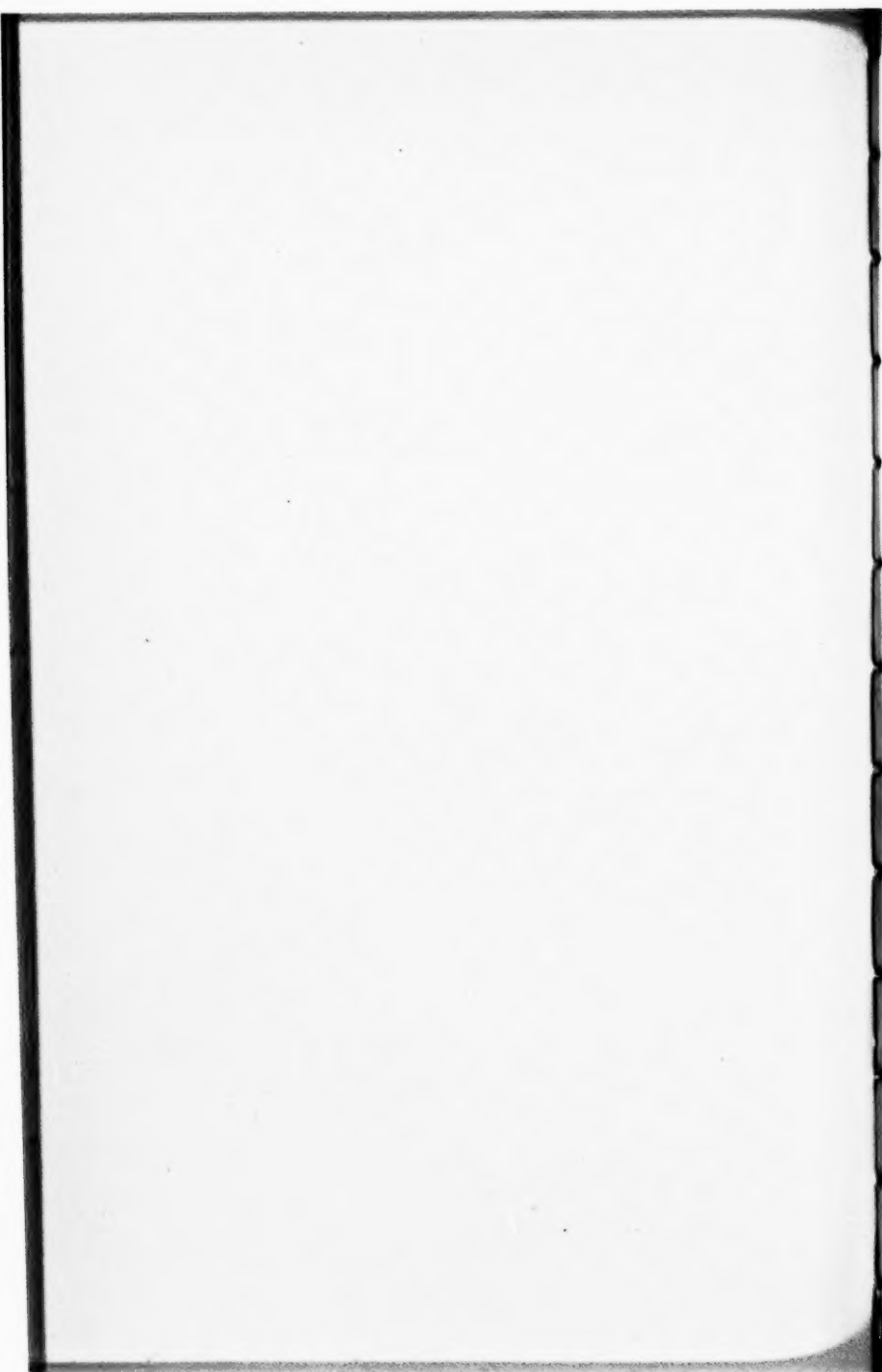
**BOSTON, CAPE COD & NEW YORK
CANAL COMPANY,
RESPONDENT.**

**On Writ of Certiorari to the United States Circuit Court
of Appeals for the First Circuit.**

**Brief for the Respondent, Boston, Cape Cod
& New York Canal Company.**

**GUY W. CURRIER,
THOMAS H. MAHONY,**

**Proctors for Respondent,
Boston, Cape Cod, and New York
Canal Company.**



INDEX TO BRIEF

	Page.
I. Statement of facts	1
II. Statement of the cases	4
III. Errors assigned by the petitioners	7
A. White Oak Transportation Company's assignments of error	7
B. Northern Coal Company's assignments of error	8
IV. Argument	8
A. The petitioners have failed to sustain the burden of proof placed upon them in their action against the Canal Company	9
1. Both lower Courts concurred in holding that no negligence which might have caused the first stranding had been established against the Canal Company	9
2. Both lower Courts concurred in holding that no negligence which might have caused the second stranding had been established against the Canal Company	10
3. The concurrent findings of both lower Courts that the Canal Company was not responsible for either stranding were in no way modified or diminished by any other finding of the Circuit Court of Appeals	14
(a) The two clauses above quoted from the opinion of the Circuit Court of Appeals do not constitute a finding of contributory negligence, but merely a finding that the Canal Company assumed the risk of any damage to its canal due to the <i>Bay</i>	

	Page.
<i>Port's</i> entering the canal in the condition in which she was on the first day	16
(1) The distinction between "assumption of risk" and "contributory negligence" exists in admiralty as well as at common law	28
(b) It was the finding of both lower Courts that the permitting of the <i>Bay Port</i> to enter the canal was not the proximate cause of any injury to either petitioner	30
(c) A finding of contributory negligence upon the part of the Canal Company would be erroneous	33
The duty of the Canal Company—	34
As to the canal	34
As to the <i>Bay Port</i>	36
B. The Canal Company amply sustained the burden of proof placed upon it in its action against White Oak Transportation Company	38
C. The Circuit Court of Appeals rightly affirmed the decree of the District Court dismissing the libel of White Oak Transportation Company and the intervening petition of Northern Coal Company	40
D. The Circuit Court of Appeals rightly ruled that White Oak Transportation Company was at fault in allowing the <i>Bay Port</i> to enter the canal	41
1. The <i>Bay Port</i> , as she was offered by her owner or agents for passage through the canal, to the knowledge of her owner, was	

in an improper and unsuitable condition for such navigation	42
(a) She was overloaded	42
(b) She was improperly trimmed upon entering the canal	43
(c) She was apt to become unmanage- able by reason of these factors	45
(d) Any error such as is alleged by the petitioners in this respect would be harmless	46
E. The Circuit Court of Appeals rightly ruled that neither White Oak Transportation Com- pany nor Northern Coal Company was entitled to recover damages from the Canal Company for either stranding	48
F. The Circuit Court of Appeals rightly held that the existence of the two shoals in the canal was not the proximate cause of either strand- ing	51
1. If any shoal existed at Station 242 or farther west in the canal, neither that shoal nor any effect that it might have had upon the navigation of the <i>Bay Port</i> on the first day was the proximate cause of either stranding	51
(a) That this shoal caused any sheer was not established	53
(b) Any sheer which might have been taken at or near the locus of the shoal was corrected	53
(c) The <i>Bay Port</i> , from Stations 242 to 230, was out of the center of the channel, and "hanging" to the right bank	55

	Page.
(d) The failure of the <i>Bay Port</i> to regain the center of the channel while proceeding about 1000 feet or more was negligent	57
2. If any shoal existed at Station 193 in the canal, neither that shoal nor any effect that it might have had upon the navigation of the <i>Bay Port</i> on the second day was the proximate cause of the second stranding of that vessel	58
(a) There was plenty of water over this shoal for the <i>Bay Port</i> to navigate without "smelling bottom"	58
(b) That this shoal caused any sheer was not established	60
(c) Any sheer taken at or near this shoal was corrected	60
G. The Circuit Court of Appeals rightly held that the first stranding was not the proximate cause of the second stranding	64
H. The Circuit Court of Appeals rightly held that the Canal Company was free from liability for the total loss of cargo on the second day, and rightly dismissed the intervening petition of Northern Coal Company	65
I. The Circuit Court of Appeals was right in not ruling, as a matter of law, that the Canal Company, to avoid liability, must prove that said shoal spots not only did not cause, but could not have caused, the two strandings, or either of them	66
1. The statute in question was not violated by the Canal Company	67

	Page.
2. This burden of proof, if imposed upon the Canal Company, was sustained	67
3. The rule set forth in <i>The Pennsylvania</i> , 19 Wall. 125, does not apply in this case	68
J. The Scott Company, or owner, or both, by their agents or employees, were negligent in the care of the <i>Bay Port</i> while upon the bank, and in allowing her to slide off in an improper and unsafe condition for navigation, while either or both were unprepared to care for her in such event	72
1. The Scott Company was employed by the owner to float and deliver the vessel to it, the obligation to the Canal Company being to use due care in that occupation	72
2. The tugs were improperly placed, either to hold the <i>Bay Port</i> against the bank, or adequately to care for her after she floated	74
3. The <i>Bay Port</i> was not made fast to the bank to prevent her getting away before the Scott Company or the owner was ready	75
K. The Circuit Court of Appeals was right in holding White Oak Transportation Company at fault for allowing the <i>Bay Port</i> to proceed through the canal after she came afloat on December 14, 1916	79
1. White Oak Transportation Company, by its agents or employees, was negligent in not holding the <i>Bay Port</i> in deep water, at or near the point where she slid off the	

	Page.
bank, until she was pumped out and made seaworthy and fit to complete the navigation of the canal	79
(a) The <i>Bay Port</i> was not in any proper condition to resume her passage through the canal	79
(b) The <i>Bay Port</i> was allowed to proceed when she might have been held by the tugs in deep water, at or near the point where she slid off the bank, until she was made seaworthy and fit to navigate the canal	80
(c) The master of the <i>Bay Port</i> does not escape responsibility for the safety of his ship, and for the determination to proceed through the canal, merely because Pilot Lewis was on board	83
(d) Any understanding as to taking the <i>Bay Port</i> to Sandwich in the event of her floating was not participated in by the Canal Company, and the Canal Company is not affected thereby	87
(e) Captain Hammett neglected to make the <i>Bay Port</i> fast to dolphins about 1000 feet east of where she floated, until she could be made seaworthy	88
L. The Circuit Court of Appeals was right in not ruling as a matter of law that Captain Hammett's decision to proceed was an error <i>in extremis</i>	93
M. Conclusion	100

TABLE OF AUTHORITIES

	Page.
Albright v. Sherer (1915), 223 Mass.	37
Baker v. Cummings, 181 U. S. 117, 126	15
Beach, Contributory Negligence (3d ed.)	682, 687
Boston, Cape Cod & N. Y. Canal Co. v. Staples Transportation Co. (1917 C. C. A.), 246 Fed.	549 34, 57
Boston & Maine R. R. v. Hooker (1913), 233 U. S. 97, 151, 152	71
Campania La Flecha v. Brauer (1897), 168 U. S. 104, 123	14, 64
Chic. B. & Q. R. Co. v. Richardson (1913 C. C. A.), 202 Fed.	836 54
Chicago & E. R. Co. v. Ponn (1911 C. C. A.), 191 Fed.	682 18
Clark v. Chambers, 3 Q. B.	327 55
Columbia & Puget Sound R. R. Co. v. Hawthorne (1891), 144 U. S.	202 37
Field v. Gowdy (1908), 199 Mass.	568, 573 71
Frost v. Josslyn, 180 Mass.	389 28
Gilchrist v. Godman (1897 D. C.), 79 Fed.	970 73
Lane v. Atlantic Works (1872), 111 Mass.	136, 140 71
Lie v. San Francisco & P. S. Co., 243 U. S.	291 69
Luckenbach v. McCahan Sugar Ref. Co. (1918), 248 U. S.	139, at 145 14
M'Adoo v. Anzellott (1921 C. C. A.), 271 Fed.	268, 23
at 269	
Marsden's Collisions at Sea (6th ed. 1910), at pages 231, 232	84
Marsden's Collisions at Sea (7th ed.), at page	27 50
Merritt & Chapman & Co. v. Morriss & Cum- mings Dr. Co. (1905 C. C. A.), 137 Fed.	780 73
Miner v. Conn. River R. R. Co. (1891), 153 Mass. 398	26

	Page.
Narramore v. Cleveland, C., C. & St. L. Ry. Co. (C. C. A. 6th Cir. 1899), 96 Fed. 298; aff. 175 U. S. 724	19
Newcomb v. Boston Protective Dept. (1888), 146 Mass. 596, 604	71
O'Malley v. South Boston Gas Light Co., 158 Mass. 135	26
Panama Railroad Company v. Napier Shipping Co. (1897), 166 U. S. 280	28
Parnaby v. Lancaster Canal Co., 11 A. & E. 223	35
Phil., W. & B. R. R. Co. v. P. & H. deG. S. T. Co. (1859), 23 How. 209, 217, 218	71
Pierce v. Clavin (1897 C. C. A.), 82 Fed. 550	18
Riddle v. Locks & Canals, 7 Mass. 169	35
Scanlon v. Wedger, 156 Mass. 462	28
Schlemmer v. Buffalo R. & P. R.R. Co. (1910), 220 U. S. 596	24
Seaboard Transportation Co. v. Boston, Cape Cod & N. Y. Canal Co. (1921 C. C. A.), 270 Fed. 525, at 531	13, 34, 36, 37, 84
Seaboard Transportation Co. v. Boston &c. Canal Co., U. S. Rep. 65 L. Ed. 592	14, 34, 36, 37, 84
Serviss v. Ferguson, 84 Fed. 202	74
Shearman & Redfield, Law of Negligence (6th ed.) sec. 114b	25
Shinners v. Props. of Locks & Canals (1891), 154 Mass. 168	37
St. Louis Cordage Co. v. Miller (1903 C. C. A.), 126 Fed. 495	20, 24
Sweeney v. Erving (1913), 228 U. S. 233	13
The Carib Prince (1898), 170 U. S. 655, 658	14, 64
The Dauntless, 121 Fed. 420	69
The E. A. Packer (1884 D. C.), 20 Fed. 339	54

	Page.
The Ellis, 152 Fed. 981	69
The Germanic (1905), 196 U. S. 589	14, 64, 99
The Henry Steers, Jr., 110 Fed. 578	74
The Iroquois (1904), 194 U. S. 240, 247	14, 64
The Maryland (1884 D. C.), 19 Fed. 551	54
The Natchez, 78 Fed. 183	61
The Oregon (1895), 158 U. S. 186	85
The Paul L. Bleakley (1906 D. C.), 146 Fed. 570	73
The Pennsylvania (1873), 19 Wall. 125	49, 68, 70
The Sam Rotan (1884 D. C.), 20 Fed. 327	54
The Sam Sloan, 65 Fed. 125	61
The S. C. Schenk, 158 Fed. 54	74
The Thielbek, 241 Fed. 209	69
The Wildcroft (1906), 201 U. S. 378, at 387	14
Thomas v. Quartermaine, L. R. 18 Q. B. Div. 685, at 698	25
Thompson, Commentaries on the Law of Negligence (1901), sec. 82 (and cases cited)	71
Todd v. Traders & Mechanics Ins. Co. (1918), 230 Mass. 595, 598	71
United States v. Clark (1906), 200 U. S. 601, 608	14
Western Transportation Co. v. Downer (1871), 78 U. S. 129	13



Supreme Court of the United States.

OCTOBER TERM, 1921.

No. 116.

WHITE OAK TRANSPORTATION COMPANY,
Petitioner,

v.

BOSTON, CAPE COD & NEW YORK CANAL COM-
PANY, *Respondent.*

No. 124.

NORTHERN COAL COMPANY, *Petitioner,*

v.

BOSTON, CAPE COD & NEW YORK CANAL COM-
PANY, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE FIRST CIRCUIT.

**Brief for the Respondent, Boston, Cape Cod &
New York Canal Company.**

I.

STATEMENT OF FACTS.

Boston, Cape Cod & New York Canal Company, a
Massachusetts corporation, which was organized under

Special Act of the Massachusetts Legislature (Acts of 1899, c. 448), at the time of the incidents herein referred to, owned, maintained, and operated the Cape Cod Canal, a tide-water canal across Cape Cod, Massachusetts, from Buzzards Bay to Cape Cod Bay.

The whaleback steamer *Bay Port* was a vessel 265 feet long, 38 feet wide, and of a net tonnage of 1075 tons, and was owned by the petitioner White Oak Transportation Company, a Maine corporation. On December 13, 1916, with a cargo of about 2393 tons of coal, owned by the petitioner Northern Coal Company, also a Maine corporation, she applied at the Buzzards Bay, or western, entrance of the Cape Cod Canal for passage easterly through the canal. The *Bay Port* was met by Captain George G. Rochester, a pilot of the Cape Pilot Association, licensed by the United States for the canal waters, and by the tug *Dalzelline* of the Cape Towing Corporation, a Delaware corporation.

The *Bay Port* proceeded into the canal in charge of Pilot Rochester, and assisted by the tug *Dalzelline*, which was out in front with a hawser on the *Bay Port's* bow. It was about half tide, and a current of 3 or 4 knots was running west in the canal. When about 2 miles east of the Bourne Highway Bridge the *Bay Port* took a slight sheer to port, which was corrected. She proceeded on her course, "hanging to" the north bank of the canal, however, for some distance, and then took a quick sheer to starboard, striking the south bank before this latter sheer was corrected, and punching one small hole in the starboard bow. As she lay upon the bank, her bow was at Station 230 of the canal (the stations being points upon the

engineers' blue-prints of the canal, and representing distances of 100 feet). The tugs *Hazelton* and *John C. Stuart*, of the said Cape Towing Corporation, responded to a call for assistance from the *Dalzelline*, and the three tugs thereupon attempted to pull the *Bay Port* off the bank, but, because of the falling tide, they were unsuccessful in that effort. The *Bay Port* remained overnight, with her bilge resting on the south bank.

White Oak Transportation Company, through its agents, thereupon contracted with The T. A. Scott Company, Inc., a company engaged in the business of repairing damaged vessels, and of caring for and removing wrecked crafts, to float the *Bay Port*, and to deliver her floating to her owner. Captain Joseph Lewis of that concern arrived on the scene of the stranding on the evening of December 13, 1916, and took charge of the operations for floating the *Bay Port*.

Early on the morning of December 14, 1916, the *Bay Port*, under the orders of the said Captain Joseph Lewis, was examined by a diver; the small hole in the bow was plugged and the leak thereby checked. Preparations to remove the cargo of coal from the *Bay Port* were made, and a part of the coal had been so removed to the Scott Company's lighter *Salvor*, which had been made fast to the port side of the *Bay Port*, when the *Bay Port* slid off and floated away from the bank, it being then about half tide, running east. At that time the tug *John C. Stuart* was outside the *Salvor*, and the tugs *Dalzelline* and *Hazelton* were both "hanging on" the bow of the *Bay Port*. All three tugs were headed west, their engines not running.

When the *Bay Port* came afloat, Captain William

Lewis, a pilot of the Cape Pilot Association who happened to be on the scene, stepped on board the *Bay Port* from one of the tugs, and, in the emergency, assisted the captain of the *Bay Port* to guide her through the canal.

The *Bay Port*, very logy, with her bow down 18 inches, and listing to port about the same, drifted approximately one third of a mile eastward before any of the tugs had turned and caught up with her. The *Dalzelline* then got a hawser over the bow of the *Bay Port* and began towing her. The *Bay Port* sheered badly from side to side, steering a zigzag course, and finally, some 6000 feet from where she floated off the bank, took a decided and sharp sheer to port. The hawser from the *Dalzelline* parted, and, in spite of all attempts to check this sheer, the *Bay Port* struck the north bank, at about Station 169, after which her stern swung to the south bank, and she sank diagonally across the canal, with her stern on the south bank. She lay in that position for some time, blocking the canal, and was finally blown up.

II.

STATEMENT OF THE CASES.

The Canal Company thereafter filed a libel against White Oak Transportation Company to recover damages arising from injuries to the canal, and to its business, due to the stranding and sinking of the *Bay Port*, which it alleged to have been due to the negligent introduction of such an unseaworthy and unmanageable vessel into the canal. The Canal Company also filed a similar libel against The T. A. Scott Company, Inc., based upon the negligent handling of the vessel while

ashore, and the negligent allowing of the *Bay Port* to float away in an unseaworthy condition. This libel is not now before this Court. Thereupon White Oak Transportation Company filed a libel against the Canal Company to recover damages arising from the stranding, sinking, and loss of the *Bay Port*, in which suit Northern Coal Company, the cargo owner, intervened, and The T. A. Scott Company, Inc., was impleaded. This libel alleged that the Canal Company was negligent in the construction and maintenance of the canal, in that there was less depth of water than the Canal Company represented and that there were shoals and projections into the canal, all of which contributed to the two strandings.

These three cases, though not formally consolidated at the time, were tried together by agreement of counsel, and, upon trial in the District Court, a finding in each case was entered in favor of the respondent therein, and each libel was dismissed, the respective respondents thereupon claiming appeals to the Circuit Court of Appeals.

The Circuit Court of Appeals affirmed the finding of the District Court for the respondent upon the libel of *White Oak Transportation Company v. Boston, Cape Cod & New York Canal Company*, but reversed the finding of the District Court upon the libel of *Boston, Cape Cod & New York Canal Company v. White Oak Transportation Company*, and found in favor of the Canal Company.

Upon the libel of *Boston, Cape Cod & New York Canal Company v. The T. A. Scott Company, Inc.*, the finding of the District Court in favor of the respondent therein was affirmed.

Subsequently, Northern Coal Company presented, and, by counsel, argued before the Circuit Court of Appeals a motion in the case of *White Oak Transportation Company v. Boston, Cape Cod & New York Canal Company*, "for an amendment of its decree in this case so as to provide that the decree of the District Court in this case be reversed as to this intervening petitioner, and that this intervening petitioner be decreed to be entitled to recover its damages and costs from the Boston, Cape Cod & New York Canal Company." This motion was denied.

White Oak Transportation Company thereupon filed its petition for certiorari in *White Oak Transportation Company, Petitioner, v. Boston, Cape Cod & New York Canal Company, Respondent*, and in *White Oak Transportation Company, Petitioner, v. Boston, Cape Cod & New York Canal Company, Respondent*, both cases being here numbered 116, and Northern Coal Company filed a similar petition in the case of *Northern Coal Company, Petitioner, v. Boston, Cape Cod & New York Canal Company, Respondent*, here numbered 124, in which it was interested as intervening petitioner, the mandates in both cases being stayed pending the disposition of the cases in this Court. Both petitions were granted, the writs issued, and the record certified to this Court.

It was stipulated by proctors for all parties that the cases now pending before this Court be consolidated for the purpose of this hearing (Rec. pp. 566, 569).

III.

ERRORS ASSIGNED BY THE PETITIONERS.

In their respective petitions for certiorari the petitioners assigned various alleged errors upon the part of the Circuit Court of Appeals which are set forth below, and which will, in general, be followed in the argument herein presented.

A. White Oak Transportation Company's Assignments of Error.

"1. In finding that the petitioner was at fault in allowing its vessel to enter the canal.

"2. In holding, after finding the petitioner at fault in allowing its vessel to enter the canal and the respondent likewise at fault, *that neither the petitioner nor the respondent nor the cargo owner is entitled to recover.*

"3. In not ruling as a matter of law that the two shoal spots over which the steamer passed just prior to both strandings were the proximate causes of the two strandings.

"4. In not ruling as a matter of law that the first stranding was the proximate cause of the second stranding.

"5. In not ruling as a matter of law that, inasmuch as the respondent admitted that the canal did not have the required statutory depth of water upon either of the shoal spots over which the steamer had passed just prior to each stranding, the burden was upon the respondent to prove not only that each stranding was not caused by such shoal spots, or either of them, but that they could not have been so caused.

"6. In holding the petitioner at fault for the act of the master of the Bay Port in allowing his steamer to proceed through the canal after she came afloat when the canal superintendent, acting under the canal regulations, had ordered the vessel through to the Sandwich end.

"7. In not ruling as a matter of law that if the captain of the Bay Port acquiesced in the action of the canal pilot taken under order of the canal superintendent and if such acquiescence was in accordance with his best judgment, even if it proved wrong, it was an error *in extremis* for which the petitioner should not be held liable in whole or in part."

B. Northern Coal Company's Assignments of Error.

"1. In affirming the decree of the District Court dismissing the libel and the intervening petition, thus refusing to allow the petitioner to recover for the damage to the cargo on the first stranding, which it found was due to the negligence of the respondent.

"2. In holding that the respondent was free from liability for the total loss of the cargo on the second stranding, and dismissing the intervening petition."

IV.

ARGUMENT.

It is submitted that the determination of the issues raised by the cases now under consideration turns squarely upon the question of whether or not the burden of proof in each instance has been sustained.

A.

The petitioners have failed to sustain the burden of proof placed upon them in their action against the Canal Company.

1. BOTH LOWER COURTS CONCURRED IN HOLDING THAT NO NEGLIGENCE WHICH MIGHT HAVE CAUSED THE FIRST STRANDING HAD BEEN ESTABLISHED AGAINST THE CANAL COMPANY.

The District Court found upon the conflicting evidence as to the first stranding that White Oak Transportation Company had failed to sustain the allegations of negligence set forth in its libel against the Canal Company. The summary finding of the District Court upon this point was as follows:

“The Canal Company was not at fault for the first stranding, which appears to me to have been due either to pure accident, or to faulty navigation by the pilot” (Rec. p. 23)—

and further that—

“From what has been said, it follows that the charges of negligence against the Canal Company by the Transportation Company have not been sustained, and that the libel against it must be dismissed” (Rec. p. 25).

The Circuit Court of Appeals also found that White Oak Transportation Company had failed to sustain the burden of proving its allegations of negligence in its libel against the Canal Company, the finding of the Circuit Court of Appeals upon the matter of the first stranding being as follows:

“The learned Judge of the District Court has

found that . . . the contention of her owners that she 'smelled the bottom', and was caused to sheer by the shoal water was not sustained . . . and that the condition here [the vicinity of the first stranding] did not warrant a finding of negligence against the Canal Company.

"We think these findings are sustained by the evidence" (Rec. p. 551).

2. BOTH LOWER COURTS CONCURRED IN HOLDING THAT NO NEGLIGENCE WHICH MIGHT HAVE CAUSED THE SECOND STRANDING HAD BEEN ESTABLISHED AGAINST THE CANAL COMPANY.

Upon the conflicting evidence upon this point, the District Court found that, as to the second stranding, White Oak Transportation Company had failed to sustain the burden of proving the allegations of negligence in its libel against the Canal Company, and, holding the Canal Company not responsible for the stranding, dismissed said libel.

The finding of the District Court upon this point was as follows:

"About two thousand feet west of where the *Bay Port* finally landed, she passed over a shallow spot much like that above described in connection with the first stranding. There was everywhere on it, except close to the sides of the channel, twenty feet of water at mean low tide; and at the time of the accident—the tide being about half up,—about three feet more, i.e., about twenty-three feet. It is contended by the owner of the *Bay Port* that the shoal caused her to sheer and was the

proximate cause of the accident; and that the Canal Company is therefore liable. This shoal was farther from the place of the final accident than the first shoal was from the first accident. Throughout the intervening distance there was at least twenty-five feet of water at mean low tide. Two separate sheers were taken and broken after passing the shoal before the steamer finally struck. It seems to me that even if the shoal be regarded as a negligent obstruction in the canal, it was not the cause of the accident" (Rec. p. 25).

The Circuit Court of Appeals also found upon this point that White Oak Transportation Company had failed to sustain the burden of proving the allegation of negligence set forth in its libel against the Canal Company, and affirmed the decree of the District Court dismissing its libel (Rec. p. 557).

The summary finding of the Circuit Court of Appeals upon this point was as follows:

"The learned Judge of the District Court has found that, while there was a less depth of water than twenty-five feet near the places in the canal where the two strandings occurred, there were . . . twenty-three feet or more on the shoal passed over by her before the second [stranding]; and that, as her greatest draft was a little over eighteen feet, the contention of her owners that she 'smelled the bottom' and was caused to sheer by the shoal water was not sustained; and that, assuming that these shoals caused her to sheer, they were so far distant from the places where the ves-

sel stranded, they were not the approximate cause of her stranding in either case. . . .

"We think these findings are sustained by the evidence. The grounds on which they are based are so fully stated in the careful opinion of the learned District Judge that it is unnecessary to add anything to the reasons which he has given" (Rec. p. 551).

In reviewing the whole case the District Court said:

"From what has been said, it follows that the charges of negligence against the Canal Company by the Transportation Company have not been sustained, and that the libel against it must be dismissed" (Rec. p. 25).

This finding of the District Court was affirmed by the Circuit Court of Appeals as follows:

"In No. 1399, the decree of the District Court is affirmed . . ." (Rec. p. 557).

Upon Northern Coal Company's motion to amend the final decree of the Circuit Court of Appeals, that Court, in denying the motion, again affirmed its findings and those of the District Court as to the absence of any negligence upon the part of the Canal Company in reference to either stranding, in the following words:

"We have concurred in the finding of the District Court that neither stranding was occasioned by any negligence of the Canal Company in the construction or maintenance of the canal" (Rec. p. 573).

Both the District Court and the Circuit Court of Appeals, therefore, concurred in the finding of fact that there was no negligence upon the part of this respondent which was the proximate cause of either stranding, or which was the cause of the loss thereafter following, and concurred in the ruling that White Oak Transportation Company and Northern Coal Company had failed to sustain the burden of proving the allegations of negligence set forth in their libel and intervening petition against this respondent. This libel was therefore properly dismissed.

Sweeney v. Erving (1913), 228 U.S. 233.

Western Transportation Co. v. Downer (1871), 78 U.S. 129.

This question of burden of proof was discussed in the case of *Seaboard Transportation Company v. Boston, Cape Cod & New York Canal Company* (1921 C.C.A.), 270 Fed. 525, at 531, which was also a case of a vessel stranding in the Cape Cod Canal, and which was tried by the same counsel as the case at bar. The same Circuit Court of Appeals as in the case at bar therein stated that—

“The burden is on the owner of the vessel to establish that its loss was caused by the Canal Company’s negligence. The natural reluctance of the mind to admit that the problem of the real cause of the accident has not been satisfactorily solved must not drive us to accept an unsound solution. Negligence must be proved by a fair preponderance of the evidence. It must not be merely guessed because of the absence of other

fully satisfactory explanation of the accident. This has been ruled in numberless personal injury cases. It is a doctrine as sound and as applicable in cases of damage to property as to persons."

The findings and rulings of the Circuit Court of Appeals in that case were before this Court upon a petition for a writ of certiorari, brought by the same counsel as appears for the petitioners in the case at bar, which petition was denied without an opinion in *Seaboard Transportation Co. v. Boston &c. Canal Co.*, U.S. Rep. 65 L. Ed. 592.

The findings in the case at bar are not against the evidence, but, on the contrary, are amply justified by the evidence, and therefore ought not to be set aside.

Luckenbach v. McCahan Sugar Ref. Co.
(1918), 248 U.S. 139, at 145.

The Germanic (1905), 196 U.S. 589.

The Wildcroft (1906), 201 U.S. 378, at 387.

United States v. Clark (1906), 200 U.S. 601, 608.

The Iroquois (1904), 194 U.S. 240, 247.

The Carib Prince (1898), 170 U.S. 655, 658.

Campania La Flecha v. Brauer (1897), 168 U.S. 104, 123.

3. THE CONCURRENT FINDINGS OF BOTH LOWER COURTS THAT THE CANAL COMPANY WAS NOT RESPONSIBLE FOR EITHER STRANDING WERE IN NO WAY MODIFIED OR DIMINISHED BY ANY OTHER FINDING OF THE CIRCUIT COURT OF APPEALS.

The petitioners erroneously assume that the Circuit Court of Appeals found as a fact that the Canal

Company, by allowing the *Bay Port* to enter the canal, was negligent, and that it was, therefore, responsible for the first stranding at least. The petitioners argue therefrom that the Canal Company was responsible for both strandings. The language of the Circuit Court of Appeals upon which the petitioners base this assumption or contention occurs in two passages of the opinion, and is as follows:

“While we think the *Bay Port* was negligent in attempting to go through the canal, yet we also think the Canal Company was equally negligent in allowing her to enter it, and that the hazard of her attempted passage was assumed by the Canal Company, with full knowledge of the risk” (Rec. p. 552).

“While we think the *Bay Port* was negligent in attempting to use the canal in her deeply laden condition, we think the Canal Company was equally at fault in allowing her to use it, and that neither should recover for any damage which may have been suffered by reason of her attempt to go through in the condition in which she was when she entered it, no negligence being alleged in her navigation by the pilot or the tug boat or members of her own crew” (Rec. p. 552).

The petitioners have isolated this language from the context as a basis for their contention. Clearly, however, the opinion of the Circuit Court of Appeals is to be read as a whole, and if, when so read, it does not reveal a clear intention to change the purport of the whole opinion, it ought not to be so construed.

Baker v. Cummings, 181 U.S. 117, 126.

The Circuit Court of Appeals had this particular matter brought specifically to its attention by Northern Coal Company in its motion to amend the decree above referred to. That motion was based upon the assumption that, in the use of the language just quoted, the Circuit Court of Appeals had found that the Canal Company was responsible for the first stranding (Rec. pp. 557, 558). The Circuit Court of Appeals thereupon pointed out that the two paragraphs of its former opinion above quoted referred only to the claim for damage to the canal asserted in the libel filed by the Canal Company against White Oak Transportation Company, and to the allegation therein contained that White Oak Transportation Company was negligent in causing a vessel of the type of the *Bay Port*, laden as she was, to enter the canal. With reference to the libel filed *against* the Canal Company the Court stated:

“We have concurred in the finding of the District Court that neither stranding was occasioned by any negligence of the Canal Company in the construction or maintenance of the canal” (Rec. pp. 572-573).

(a) *The two clauses above quoted from the opinion of the Circuit Court of Appeals do not constitute a finding of contributory negligence, but merely a finding that the Canal Company assumed the risk of any damage to its canal due to the Bay Port's entering the canal in the condition in which she was on the first day.*

When the two clauses are read with the balance of the two opinions of the Circuit Court of Appeals, it is

clear that they contain nothing to indicate that the Court intended to modify or diminish its general finding that the Canal Company was in no way responsible for either stranding. The terms "contributory negligence" and "assumption of risk," though having distinct and different meanings, have at times, and erroneously, been used interchangeably. While the Circuit Court of Appeals in this case used language which was somewhat loose and ambiguous, it is nevertheless clear that what the Court intended in the two paragraphs quoted was a finding that the Canal Company had assumed the risk of allowing the *Bay Port* to enter the canal as she was on the first day, and hence could not recover for any injuries to the canal due to the *Bay Port's* then condition.

The correctness of such finding will be discussed hereinafter. But, for the purpose of arguing this point, it may be assumed that such finding was justified.

The Circuit Court of Appeals has definitely stated that in the two paragraphs now under consideration it was discussing the suit of the Canal Company against White Oak Transportation Company only, and it follows, therefore, that the action of White Oak Transportation Company against the Canal Company for the loss of the vessel is unaffected thereby.

Northern Coal Company is not affected by any finding made in these paragraphs, for the reason that Northern Coal Company was not even a party to the action brought by the Canal Company against White Oak Transportation Company.

There is a very clear-cut distinction between "assumption of risk" and "contributory negligence."

"The subjects of assumption of risk and con-

tributory negligence are much confused in many of the decisions. They are entirely distinct. One has to do with contract, and the other rests in tort."

Chicago & E.R. Co. v. Ponn (1911 C.C.A.),
191 Fed. 682, 687.

Beach, in his text-book on Contributory Negligence (3d ed.), sec. 37, states:

"While it is unquestionably true that one may voluntarily and unnecessarily expose himself or his property to danger without thereby becoming guilty of contributory negligence as matter of law, it is, nevertheless, an established rule that, where one does knowingly put himself or his property in danger, there is a presumption that he, *ipso facto*, assumes all risks reasonably to be apprehended from such course of conduct. . . . Knowledge, however, in this respect, does not necessarily constitute contributory negligence. It is plain that one may exercise due care with full knowledge of the danger to which he is exposed or to which he lawfully exposes himself. This certainly is not contributory negligence."

"The doctrine of assumption of risk is not to be confounded with the doctrine of contributory negligence; for where the former doctrine is applicable, the servant may exercise the greatest care, and yet be precluded from recovery for an injury in the performance of his service because the risk was assumed."

Pierce v. Clavin (1897 C.C.A.), 82 Fed. 550,
553.

In the case of *Narramore v. Cleveland, C., C. & St. L. Ry. Co.* (C.C.A. 6th Circuit, 1899), 96 Fed. 298, which was a master and servant case, the question at issue was whether a railroad employee under his contract of employment assumed the risk of injury from an unblocked switch, in view of a statutory requirement that such switches be blocked. The Court held that he did not, which ruling was affirmed by this Court, without opinion, in 175 U.S. 724. The Circuit Court of Appeals in that case discussed at length the subjects of assumption of risk and contributory negligence. In part the Court said that—

“Assumption of risk is a term of the contract of employment, express or implied from the circumstances of the employment, by which the servant agrees that dangers of injury obviously incident to the discharge of the servant’s duty shall be at the servant’s risk. In such cases the acquiescence of the servant in the conduct of the master does not defeat a right of action on the ground that the servant causes or contributes to cause the injury to himself; but the correct statement is that no right of action arises in favor of the servant at all, for, under the terms of the employment, the master violates no legal duty to the servant in failing to protect him from dangers the risk of which he agreed expressly or impliedly to assume. The master is not, therefore, guilty of actionable negligence towards the servant”—

and further that—

“Assumption of risk is in such cases the acqui-

escence of an ordinarily prudent man in a known danger, the risk of which he assumes by contract. Contributory negligence in such cases is that action or nonaction in disregard of personal safety by one who, treating the known danger as a condition, acts with respect to it without due care of its consequences. The distinction has been recognized by the Supreme Court of the United States. In *Railway Co. v. O'Brien*, 161 U.S. 451, 16 Sup. Ct. 618, the court said:

“ ‘The second instruction was properly refused because it confused two propositions,—that relating to the risks assumed by an employee in entering a given service, and that relating to the amount of vigilance that should be exercised under given circumstances.’

“ ‘Assumption of risk and contributory negligence approximate where the danger is so obvious and imminent that no ordinarily prudent man would assume the risk of injury therefrom. But where the danger, though present and appreciated, is one which many men are in the habit of assuming, and which prudent men who must earn a living are willing to assume for extra compensation, one who assumes the risk cannot be said to be guilty of contributory negligence if, having in view the risk of danger assumed, he uses care reasonably commensurate with the risk to avoid injurious consequences.’ ”

In the case of *St. Louis Cordage Co. v. Miller* (1903 C.C.A.), 126 Fed. 495, which has been cited with approval many times in the Circuit Court of Appeals, this

question is discussed at great length and the cases bearing upon it are therein collected. The Court therein stated that—

“The doctrine of assumption of risk is placed by the authorities and sustained upon two grounds” (p. 501).

“The first ground upon which this rule of law rests is the maxim, *Volenti non fit injuria* (p. 501).

“No one can justly be held liable to another for an injury resulting from a risk which the latter knowingly and willingly consented to incur” (p. 501).

“The second ground upon which assumption of risk is based is that every servant who enters or continues in the employment of a master without complaint thereby either expressly or impliedly agrees with him to assume the risks and dangers incident to the employment which a person of ordinary prudence in his situation would have known by the exercise of ordinary diligence and care, and to hold his master free from liability therefor” (p. 502).

“The truth is that, while assumption of risk and contributory negligence both apply to prevent a recovery in cases in which the servant has knowingly and willingly exposed himself to dangers too imminent for prudent persons to incur, they are neither identical in effect or coincident in extent, and the latter has no application and constitutes no defense in that great majority of cases in which

assumption of risk is an impregnable bar to a recovery where prudent persons assume the obvious dangers of their employments which are neither imminent nor great. Assumption of risk is the voluntary contract of an ordinarily prudent servant to take the chances of the known or obvious dangers of his employment and to relieve his master of liability therefor. Contributory negligence is the causal action or omission of the servant without ordinary care of consequences. The one rests in contract, the other in tort. Contributory negligence is no element or attribute of assumption of risk. The latter does not prevail because the servant was or was not negligent in making his contract and in exposing himself to the defect and danger which injured him, but because he voluntarily agreed to take the risk of them. No right of action in his favor in such a case can arise against the master, because the latter violates no duty in failing to protect the servant against risks and dangers which the latter has voluntarily agreed to assume and to hold the former harmless from" (pp. 502-503).

"The unavoidable logical deduction from the principles and decisions to which we have adverted is that assumption of risk and contributory negligence are distinct and independent defenses, that the former rests in contract and upon the maxim, *Volenti non fit injuria*, and is not conditioned or limited by the probability or improbability, the imminence or the remoteness, of the danger from the risk assumed, or by the existence or by the absence of contributory or other negligence on the part of

the party who undertakes to assume the risk, while contributory negligence is founded upon an absence of ordinary care which causes or contributes to the injury which is the basis of the suit. This conclusion is fortified by the numberless decisions in which the defense of assumption of risk has been sustained in which the plaintiffs were not guilty of contributory negligence, cases in which prudent persons in the exercise of ordinary care would have assumed and ordinarily did assume the very risks which were the subjects of the actions" (p. 505).

"Assumption of risk and contributory negligence are separate and distinct defenses. The one is based on contract, the other on tort. The former is not conditioned or limited by the existence of the latter, and is alike available whether the risk assumed is great or small, and whether the danger from it is imminent and certain or remote and improbable" (p. 508).

This Court also has clearly drawn the distinction between "assumption of risk" and "contributory negligence," as is stated in *M'Adoo v. Anzellott* (1921 C.C.A.), 271 Fed. 268, at 269:

"Whether the definition attempted in the St. Louis Cordage Co. Case is the last word or not, the rule that the two things are two things and not identical has never been departed from in the subsequent decisions of the Supreme Court; e.g., *Schlemmer v. Buffalo, etc., Ry.*, 220 U.S. 590, 31 Sup. Ct. 561, 55 L.Ed. 596; *Seaboard Air Line v.*

Horton, 239 U.S. 595, 36 Sup. Ct. 180, 60 L.Ed. 458; *Erie Rd. v. Purucker*, 244 U.S. 320, 37 Sup. Ct. 629, 61 L.Ed. 1166; *Boldt v. Pennsylvania, etc., Co.* 245 U.S. 441, 38 Sup. Ct. 139, 62 L.Ed. 385.”

In the case of *Schlemmer v. Buffalo R. & P. R.R. Co.* (1910), 220 U.S. 596, this Court stated that—

“While, as was said in the case when here before, assumption of risk sometimes shades into negligence as commonly understood, there is nevertheless a practical and clear distinction between the two. In the absence of statute taking away the defense, or such obvious dangers that no ordinarily prudent person would incur them, an employee is held to assume the risk of the ordinary dangers of the occupation into which he is about to enter, and also those risks and dangers which are known, or are so plainly observable that the employee may be presumed to know of them, and if he continues in the master’s employ without objection, he takes upon himself the risk of injury from such defects. *Choctaw, O. & G. R. Co. v. McDade*, 191 U.S. 64, 67, 68, 48 L. ed. 96, 100, 101, 24 Sup. Ct. Rep. 24, and former cases in this court therein cited. ‘Contributory negligence, on the other hand, is the omission of the employee to use those precautions for his own safety which ordinary prudence requires.’ ”

The case of *St. Louis Cordage Company v. Miller*, *supra*, holds that, in addition to “assumption of risk” resting upon a contractual relation, which need not

necessarily be that of master and servant, it also rests upon the broader doctrine of *volenti non fit injuria*, which is restricted neither to the field of relations of master and servant nor to any other contract relations. It includes all cases where one knowingly and, appreciating a risk, voluntarily assumes that risk.

Shearman & Redfield, in their treatise on the Law of Negligence (6th ed.), sec. 114*b*, make the following statement:

“Volenti non fit injuria—It is proposed to treat in this chapter, the doctrine of assuming, taking or accepting the risk as a defense to actions founded on negligence generally, existing independently of contributory negligence and irrespective of the contractual relation of master and servant. It is well settled that, independent of the relation of master and servant, there may be a voluntary assumption of the risk of a known danger arising from the negligence of another, which will debar one from the recovery of compensation in case of injury to person or property therefrom, even though he is in the exercise of due care. ‘It may be consistent with due care to incur a known danger voluntarily and deliberately’; . . .”

In this respect see *Thomas v. Quartermaine*, L.R. 18 Q.B. Div. 685, at page 698, in which case the Court said:

“A confusion in applying the . . . [doctrine, *Volenti non fit injuria*] to the special case of master and servant has at times arisen out of the fact that, by the contract of service, the workman was deemed to have taken upon him the ordinary risk

of a business lawfully carried on upon his master's premises; and it has been assumed as an *a fortiori* case that he took upon himself such risks as were visible or known. This is one way of putting such a defense, and may in many cases be sufficient; but there is another way of stating it, and another principle wholly independent of contract, on which a similar defense arises. The law is full of instances where duties assume a double aspect, and may be viewed concurrently as arising by implication out of a contract, or as created by some wider principle of law which happens to take effect and to receive apt illustration in the particular instance of some particular contract."

In *O'Malley v. South Boston Gas Light Company*, 158 Mass. 135, which was an action by a servant against his master, the Court stated:

"The doctrine of assumption of the risk of his employment by an employee has usually been considered from the point of view of a contract, express or implied; but, as applied to actions of tort for negligence against an employer, it leads up to the broader principle expressed by the maxim, *Volenti non fit injuria*. One, who knowing and appreciating a danger, voluntarily assumes the risk of it, has no just cause of complaint against another who is primarily responsible for the existence of the danger."

In the case of *Miner v. Conn. River R.R. Co.* (1891), 153 Mass. 398, which was not a master and servant case, and involved no contract relation between the

parties, the Massachusetts Court, in its opinion, held in part as follows:

“There was no relation of master and servant existing between the defendant and Gourley [the plaintiff’s agent].”

“Independently of any relation of master and servant, there may be a voluntary assumption of the risk of a known danger, which will debar one from recovering compensation in case of injury to person or property therefrom, even though he was in the exercise of due care. In other words, it may be consistent with due care to incur a known danger voluntarily and deliberately; and this may be so when the danger arises from the known or apprehended neglect or carelessness of others.

. . .

“Ordinarily, in actions to recover damages for injuries to person or property, an instruction as to the effect of contributory negligence on the part of the plaintiff will cover all that need be said to the jury upon this branch of the case. But the principle that one may be debarred from recovery when he voluntarily assumes the risk is not identical with the principle on which the doctrine of contributory negligence rests, and in proper cases this ought to be explained to the jury. One may with his eyes open undertake to do a thing which he knows is attended with more or less peril; and he may, both in entering upon the undertaking and in carrying it out, use all the care he is capable of. But whether or not he thereby assumes the risk may depend on other circumstances.”

In the case of *Scanlon v. Wedger*, 156 Mass. 462, it was held that a voluntary spectator at an exhibition of fireworks in a public street—

“must be held to consent to it and he suffers no legal wrong if accidentally injured without negligence on the part of anyone, although the show was unauthorized. He takes the risk.”

This rule of law was affirmed in the case of *Frost v. Josslyn*, 180 Mass. 389.

(1) *The distinction between “assumption of risk” and “contributory negligence” exists in admiralty as well as at common law.*

In the case of *Panama Railroad Company v. Napier Shipping Company* (1897), 166 U.S. 280, the agents of a vessel, in taking her into a berth at a pier, struck the spindle of a submerged dredge, the existence and the dangers of which were recognized both by the agents of the vessel and by the owner of the pier, although the exact location of which was unknown to either. The owner of the vessel brought suit against the owner of the pier for injury to the vessel, upon the theory that the owner of the pier was negligent in allowing the vessel to enter such berth. It was held, however, that the owner of the pier was not liable, the agent of the vessel having assumed the risk with full knowledge.

In the case at bar the Circuit Court of Appeals was in effect applying this same rule, the positions of the parties in the case at bar being the reverse of that of the parties in the *Panama R.R. Co. v. Napier Shipping Co.* case.

The terms used by the Circuit Court of Appeals in the case at bar are terms of "assumption of risk," for the Court says:

"the hazard of her attempted passage was assumed by the Canal Company with full knowledge of the risk" (Rec. p. 551).

"When she entered the canal upon the previous day, we think the Canal Company assented to her navigation of the canal in the condition in which she then was . . ." (Rec. p. 554)—

and immediately thereafter—

"We do not find any evidence that the Canal Company assented to her undertaking the navigation of the canal in the condition in which she was when she slid off the bank . . ." (Rec. p. 554).

The Court in no place used the term "contributory negligence" in reference to the Canal Company, and in no place stated that any act or omission of the Canal Company with reference to allowing the *Bay Port* to enter the canal contributed to her loss or to the loss of the cargo. In fact, that Court definitely stated that neither stranding was occasioned by any negligence of the Canal Company in the construction or maintenance of the canal; and in discussing the character of the *Bay Port* and the Canal Company's knowledge thereof (Rec. pp. 551-552) it referred to the respondent's knowledge of the risk assumed in allowing her to enter the canal. It is manifest, therefore, that the Court intended its finding set forth in the two passages complained of by the petitioners to mean "assumption of risk," and not "contributory negligence."

Both lower Courts having found that no breach of duty on the part of the Canal Company caused any of the loss complained of by the petitioners, it must be concluded that the Circuit Court of Appeals, in the two paragraphs quoted, had in mind the assumption of a known risk by the Canal Company as the reason for denying the Canal Company any recovery for damage caused to the canal on the first day.

Clearly, then, these two findings of the Circuit Court of Appeals were confined to the libel brought by the Canal Company against White Oak Transportation Company.

It follows that they do not affect the libel against this respondent or the finding of both lower Courts with reference thereto, viz., to the effect that the petitioners failed to sustain the burden of proof assumed by them under said libel (Rec. p. 551).

(b) It was the finding of both lower Courts that the permitting of the Bay Port to enter the canal was not the proximate cause of any injury to either petitioner.

The Circuit Court of Appeals, in affirming the finding of the District Court upon the libel brought by *White Oak Transportation Company v. Boston, Cape Cod & New York Canal Company* found that the allowing of the *Bay Port* to enter the canal was not the proximate cause of the first stranding. Even assuming negligence upon the part of the Canal Company in allowing the *Bay Port* to enter the Canal, as the petitioners contend that the Circuit Court of Appeals found, no liability attached, since such negligence

would fall within the maxim of *damnum absque injuria*.

The District Court found that—

“The causes of the first stranding seem to have been the large amount of port helm, which, by the pilot’s orders, had been given the steamer to bring her away from the bank, the suddenness with which she finally minded her helm and the unexpectedly large swing which she took, the general current and cross-current in the canal, all of which acting together made it impossible to control her in time to prevent her from striking” (Rec. p. 22)—

and again that—

“The Canal Company was not at fault for the first stranding which appears to me to have been due either to pure accident, or to faulty navigation by the pilot” (Rec. p. 23).

The District Court also found that the condition of the canal had nothing to do with either stranding, and the Circuit Court of Appeals adopted and affirmed these findings in the following words:

“The learned judge of the District Court has found that . . . the contention of her owners that she ‘smelled the bottom’ and was caused to sheer by the shoal water was not sustained; . . . and that the condition of the canal here [the vicinity of first stranding] did not warrant a finding of negligence against the Canal Company” (Rec. p. 551).

And in approval of these findings of the District Court the Circuit Court of Appeals went on to say :

“We think these findings are sustained by the evidence. The grounds on which they are based are so fully stated in the careful opinion of the learned District Judge that it is unnecessary to add anything to the reasons which he has given” (Rec. p. 551).

Counsel for all parties discussed at length this matter of permitting the *Bay Port* to enter the canal, at the hearing before the Circuit Court of Appeals upon Northern Coal Company's motion to amend the decree already referred to. In its opinion accompanying the denial of this motion the Circuit Court of Appeals reaffirmed its finding as follows :

“We have concurred in the finding of the District Court that neither stranding was occasioned by any negligence of the Canal Company in the construction or maintenance of the canal” (Rec. p. 573).

This, if it means anything, is a finding that neither the permitting of the *Bay Port* to enter the canal nor the condition of the canal caused the first stranding. It is also a ruling that White Oak Transportation Company and Northern Coal Company failed to sustain their allegations of negligence set forth in the libel and intervening petition against this respondent. The reasons of the District Court were accepted, approved, and stated as the reasons for the findings and rulings of the Circuit Court of Appeals. This being so, the said libel was properly dismissed.

There is nothing in either opinion of the Circuit Court of Appeals which indicates that the paragraphs complained of by these petitioners were intended to derogate from the findings sustaining the ruling of the District Court that the petitioners had failed to sustain the burden of proof. On the contrary, the second opinion of the Circuit Court of Appeals makes it most clear that such paragraphs were not so intended, but were intended to be subordinate to the finding that there was no negligence upon the part of the Canal Company which caused either stranding, and subordinate to the ruling that the burden of proof had not been sustained by the petitioners.

The petitioners therefore are in error when they assert, as they do, that the Circuit Court of Appeals found that the first stranding was due to the negligence of the respondent.

(c) A finding of contributory negligence upon the part of the Canal Company would be erroneous.

If the Circuit Court of Appeals were to find that the Canal Company was guilty of contributory negligence, that finding manifestly would be erroneous.

The duty of the Canal Company is clearly set forth in the opinion of the District Court in the following words:

“The canal is one of the well-known waterways on this part of the coast. Competent navigators may be assumed to be familiar with its general characteristics. It is a narrow channel, of no great depth, in which at times heavy tidal currents exist. The Canal Company does not

guarantee the safety of vessels using the canal; its obligations are not to misrepresent what it offers, and to use reasonable care for the safety of vessels which accept its offer and avail themselves of the canal" (Rec. p. 20).

After discussing the evidence bearing upon the matter of the Canal Company's permitting the *Bay Port* to enter the canal, the District Court found, as a matter of fact, that—

"It does not seem to me that the condition of the canal there was such as to warrant a finding of negligence against the Canal Company for permitting the *Bay Port* to use the Canal" (Rec. pp. 22, 23).

The duty of the Canal Company.

As to the canal.

The duty of the Canal Company was not that of an insurer of the safety of the canal, nor was the Canal Company bound to exercise the degree of care and diligence of a common carrier of passengers. The obligation of the Canal Company was to use reasonable care under the circumstances of the particular case in order to render navigation of its canal safe.

Seaboard Transportation Co. v. Boston, Cape Cod & New York Canal Company (1921), 270 Fed. 525; U.S. Rep. 65 L. Ed. 592.

Boston, Cape Cod & New York Canal Co. v. Staples Transportation Co. (1917), 246 Fed. 549.

Parnaby v. Lancaster Canal Co., 11 A. & E. 223.

Riddle v. Locks & Canals, 7 Mass. 169.

The Canal Company was entitled to assume that the *Bay Port* was properly loaded and properly trimmed, was seaworthy and reasonably manageable in a narrow waterway. In other words, the Canal Company had a right to assume that the owner and the master of the *Bay Port* would not introduce the *Bay Port* into the canal unless she was reasonably qualified to navigate it.

Apart from the allegations of White Oak Transportation Company as to negligence on the part of the Canal Company with reference to the shoals, "knuckle," and currents, which will be dealt with later, the only other allegations of negligence are to the effect that the Canal Company represented that there were 25 feet of water in the canal at mean low water, and that, in reliance upon such representation, the *Bay Port* entered the canal. The testimony is to the effect that Captain Hammett received a copy of the regulations on a previous trip through the canal, and saw therein that the depth of water at mean low water was 25 feet (Hammett, Rec. pp. 424, 425, Qs. 18-21). There was no representation, in the sense ordinarily understood, to the effect that "We have throughout our Canal, at every spot, 25 feet of water." But in the description of the canal, in relation to the width and construction, appears a statement that the depth of the water, at mean low water, is 25 feet. The canal was in the main 25 feet deep; it was so constructed (Belmont, Rec. p. 541, X-Qs. 33-35). There

was no intention to mislead anybody with a statement of the general character of the canal, because, as is well known, shoals will unavoidably accumulate in that locality. This suit is not based upon false representation, and, even if it were, the petitioners would have to prove that the damages suffered resulted from the false representation. Furthermore, as stated by both lower Courts, the damages in this case did not result from the fact that there were one or two shoals in this canal where the water was less than 25 feet at mean low tide.

See *Seaboard Transp. Co. v. Boston, Cape Cod & New York Canal Co.*, 270 Fed. 525; U.S. Rep. 65 L. Ed. 592.

Circulars had been sent from time to time to the patrons of the canal, announcing that the canal was open to vessels of various drafts: at first up to 12 feet, then to 15, and at the time of the accident, 20 feet (Belmont, Rec. p. 539, X-Qs. 15, 16; Coakley, Rec. p. 300, X-Qs. 197-200; Rec. pp. 57, 68, Ints. to Canal Co. 6, 7, 8).

Captain Hammett and White Oak Transportation Company were charged with notice and knowledge of the fact that the canal was open only to vessels of 20 feet draft or less.

As to the Bay Port.

The question as to whether or not the Canal Company might be negligent in permitting the *Bay Port* to enter the canal depends, among other things, upon the experience of those in charge of the canal. The fact that the *Bay Port* went safely through the canal, un-

loaded, at least twice before was a fact upon which the Canal Company had a right to rely as a basis for its judgment in permitting the *Bay Port* to enter the canal.

Seaboard Transportation Company v. Boston, Cape Cod & New York Canal Company (1921), 270 Fed. 525; U.S. Rep. 65 L. Ed. 592.

It might be said, in passing, that the statement of the Circuit Court of Appeals, that "the pilot who went out to her [*Bay Port*] asked her captain her draft, and was informed what she drew both forward and aft and must have reported to the superintendent what he was told," was purely gratuitous, as there was no evidence whatever that Pilot Rochester communicated with the canal superintendent from the time he went down to meet the *Bay Port* until after the first stranding. In fact, it was physically impossible for him so to do.

The reasoning of the Circuit Court of Appeals to the effect that after the stranding the Canal Company issued a notice denying the use of the canal to whalebacks was evidence of prior negligence is also unwarranted. It is almost axiomatic that measures taken after an accident to prevent the happening of a similar accident are not of themselves evidence of prior negligence.

Columbia & Puget Sound R.R. Co. v. Hawthorne (1891), 144 U.S. 202.

Albright v. Sherer (1915), 223 Mass. 39.

Shinners v. Props. of Locks & Canals (1891), 154 Mass. 168.

The respondent therefore contends that, if the Circuit Court of Appeals were to find that it was guilty of contributory negligence, such finding would be erroneous. It follows that the only reasonable construction of the two opinions of the Circuit Court of Appeals is that the Court intended to rule that the Canal Company assumed the risk of injury to the canal resulting from the condition of the *Bay Port* at the time she entered the canal.

B.

The Canal Company amply sustained the burden of proof placed upon it in its action against White Oak Transportation Company.

It was alleged by the Canal Company in its libel against White Oak Transportation Company that the second stranding and the resulting damage to the canal was caused by negligence in the management of the *Bay Port* chargeable to her owners. The District Court found that—

“Considering all the circumstances, I think that Captain Hammett [of *Bay Port*] was not negligent for not preventing the pilot Lewis from attempting to take the ship through to Sandwich . . .” (Rec. p. 27).

The Circuit Court of Appeals, however, reversed the decree of the District Court, and, in entering a decree allowing the Canal Company to recover against White Oak Transportation Company, stated that—

“Looking at the situation as it is presented by the evidence and not in the light of subsequent

events, we think that he [Captain Hammett] was negligent in allowing his vessel to proceed before she was pumped out and her cargo adjusted" (Rec. p. 556).

"As the Canal Company had not consented to her navigation of the canal in this condition, it is entitled to recover all damage which it has suffered from her second stranding and sinking" (Rec. p. 556).

Later the Circuit Court of Appeals, in its second opinion, stated that—

"The second stranding of the steamer we have found was occasioned by the negligence of the Captain of the Bay Port in attempting to navigate the canal with a vessel which was partially filled with water and down by the head to such an extent that it sheered badly. We have found that the Canal Company did not consent to the navigation of the canal by the Bay Port in her then condition and that the owners of the Bay Port are liable to the Canal Company for whatever damages it may have sustained by reason of the attempted navigation by the Bay Port in her disabled condition" (Rec. p. 573).

The Canal Company having thus, in the opinions of the Circuit Court of Appeals, sustained the burden of proof imposed upon it in its suit against White Oak Transportation Company, the decrees of the Circuit Court of Appeals should not be set aside unless clearly unwarranted by the evidence. It will be hereinafter

shown that the record amply supports these findings of negligence in the management of the *Bay Port*.

Respondent respectfully urges, therefore, that the decrees entered by the Circuit Court of Appeals should be affirmed. If, however, this Court should feel called upon to review the whole record in these cases, the respondent respectfully submits that the errors assigned by the petitioners are not supported by that record.

C.

The Circuit Court of Appeals rightly affirmed the decree of the District Court dismissing the libel of White Oak Transportation Company and the intervening petition of Northern Coal Company.

Northern Coal Company has set forth as its first assignment of error the action of the Circuit Court of Appeals in affirming the decree of the District Court dismissing the libel and intervening petition of the petitioners.

It has been made to appear hereinbefore in the argument that these decrees of affirmance and dismissal were based upon definite findings of both Courts to the effect that Northern Coal Company had failed to sustain the burden of proving negligence on the part of the Canal Company which was the proximate cause of the loss of the vessel or cargo, and that these findings were not diminished or modified by any subsequent finding. In the face of these concurrent findings by both lower Courts, which are shown to have been amply justified by the evidence, it is submitted, upon the argument hereinbefore, that no error was committed as alleged by Northern Coal Company, and that its first assignment of error should be overruled.

D.

The Circuit Court of Appeals rightly ruled that White Oak Transportation Company was at fault in allowing the Bay Port to enter the Canal.

The history of the vessel's trip prior to her arrival at the canal, and her condition at the time of her application for passage through the canal, as related by the witnesses, was such that it was negligent upon the part of the master of the *Bay Port*, and therefore upon the part of White Oak Transportation Company, to attempt to take the vessel through the canal.

The District Court found that the *Bay Port* was a type of lake vessel that did not "handle as sharply nor as well as those of the usual deep sea model," and that she was deep-laden (Rec. p. 20).

The Circuit Court of Appeals, in passing upon this point, referred to this finding of the District Court as follows:

"We think this finding in regard to her steering qualities, qualified as it was, that 'she steered as well as the ordinary whaleback steamer', is in accord with the evidence; but this convinces us that any steamer of this type, when deeply laden, is very difficult to handle; much more so than those of 'the usual deep sea model', and that even when properly trimmed and in tow of a tug she is liable to sheer . . ." (Rec. p. 661).

White Oak Transportation Company contends that the above finding of the Circuit Court of Appeals was wholly unwarranted and not based upon the evidence.

There was, however, ample evidence to warrant this

finding. Apart from the circumstantial evidence in the case, there was positive evidence that the *Bay Port* was liable to sheer with such cargo even when properly trimmed and with a tug ahead (Wilson, Rec. p. 149, Qs. 55-58).

1. THE BAY PORT, AS SHE WAS OFFERED BY HER OWNER OR AGENTS FOR PASSAGE THROUGH THE CANAL, TO THE KNOWLEDGE OF HER OWNER, WAS IN AN IMPROPER AND UNSUITABLE CONDITION FOR SUCH NAVIGATION.

(a) *She was overloaded.*

The testimony of Mr. Wilson, at one time chief officer of the *Bay Port* while she was upon the lakes, is the only testimony with reference to the use and purposes for which the *Bay Port* was built, and his testimony is uncontroverted. He stated that the *Bay Port* was a lake whaleback, designed and built for a draft of 14 feet 6 inches, and never intended or built for a draft of 18 feet 2 inches; that when upon the lakes she was never loaded to a greater draft than 17 feet, in the fall of the year; that, if loaded to 17 feet 6 inches, she would steer badly and be more susceptible to the action of currents than if loaded to a lesser draft (Rec. pp. 147, 148, Qs. 36-49; pp. 149, 150, Qs. 60-63). He also stated that, if she was loaded to a draft of 18 feet 2 inches when presented for passage through the canal, she was unsafe to navigate the canal (Rec. p. 150, Q. 65).

That the *Bay Port* was loaded beyond a draft of 18 feet 2 inches when she left Newport News is not disputed by the petitioners. All the witnesses upon this point testified that when she left Newport News her

draft aft was 18 feet 10 inches; her draft forward was somewhat in dispute, the witness Hart placing the forward draft at 17 feet 10 inches, and other witnesses placing it at 17 feet 6 inches (Shelton, Rec. p. 459, Q. 25; Hart, Rec. p. 410, Qs. 13-16).

According to the testimony of her officers, when she reached the canal she drew 18 feet 2 inches aft, and 17 feet 6 inches, or 17 feet 8 inches, forward (Hart, Rec. p. 411, Qs. 23-25). In other words, her bow had gone down (Hammett, Rec. p. 425, Q. 36).

Canal Company Exhibit 1, a photograph of the *Bay Port*, showed the deepest loading marks on the *Bay Port's* side to be 17 feet (Rec. pp. 154, 155). This is indicative of the greatest depth to which the vessel was intended or expected to be loaded (Wilson, Rec. pp. 155, 156, Qs. 147-155).

The vessel therefore was overloaded when she left port, and overloaded when she reached the canal.

(b) *She was improperly trimmed upon entering the canal.*

The evidence is almost conclusive that a vessel of the *Bay Port* type, to be properly trimmed, should be loaded so that she will have a "drag" of from 1 foot to 18 inches; that is, loaded so that her stern will be deeper than her bow (Shelton, Rec. pp. 478, 479, Qs. 337-340, 344-349; J. W. Maker, Rec. p. 359, X-Qs. 83, 84). It also appears that on the previous trip she was loaded so that upon leaving port she had a drag of 2 feet 2 inches (Shelton, Rec. p. 479, X-Q. 351).

When on the lakes her trim, once fixed before leaving port, would be preserved, because lake water was

used for the engines, and the water tanks aft were used as ballast tanks. When she went into the Atlantic service the necessity for fresh-water tanks caused the changing of these ballast tanks into fresh-water tanks. In this way the use of these tanks to maintain her trim, as had been intended and as she had been designed, was made impossible, because of the fact that these tanks, holding 12,000 gallons of water, situated well aft in the vessel, gradually emptied and lightened the vessel aft as the water was used. The bunkers for coal used in locomotion of the vessel were also situated well aft. It is obvious that the consumption of coal and of water inevitably changed her trim, and caused her stern to come up.

As she was loaded upon this trip it was estimated by White Oak Transportation Company's witnesses that her stern would come up approximately 6 inches to 7 inches before she reached the Cape Cod Canal, by reason of this use of the fresh water and coal (J. W. Maker, Rec. p. 356, Qs. 34-36; Shelton, Rec. p. 459, Qs. 27, 28). But the master of the *Bay Port* stated that she was properly trimmed when she left port (Shelton, Rec. pp. 478, 479, X-Qs. 344-349). Therefore, any decided change in trim, such as that which took place, rendered her trim after such change improper for safe navigation.

When the *Bay Port* reached the canal she drew 17 feet 8 inches forward (Hammett, Rec. p. 425, Q. 36; Hart, Rec. p. 411, Qs. 23-25) and 18 feet 2 inches aft (Rec. pp. 39, 53, Int. No. 30), her stern had lifted 8 inches and her bow lowered 2 inches, a net difference of 10 inches. In other words, she had about one third the "drag" she should have had, as she was "by the

stern" only 6 inches, which none of the witnesses stated was sufficient "drag" to constitute a proper trim. In addition to the statements of the *Bay Port* witnesses as to the draft, Donnelly, of the tug *Dalzel-line*, stated that she was "by the bow about one foot" on entering the canal (Donnelly, Rec. p. 216, Qs. 20, 21; p. 223, X-Qs. 116-120).

Wilson, who knew the vessel better than anybody else, testified that the use of coal and water from Newport News to the canal would put her by the head from 14 inches to 18 inches, which would cause a considerable difference in her trim (Rec. pp. 148, 149, Qs. 50-59; pp. 152, 153, X-Qs. 114-118).

The *Bay Port*, overloaded and improperly trimmed when she left Newport News, was, therefore, overloaded and improperly trimmed for purposes of proper steering and handling when she was presented for passage through the canal.

(c) *She was apt to become unmanageable by reason of these factors.*

Wilson stated that there was considerable difference in her handling, depending on whether she was loaded to a draft of 14 feet or of 17 feet; that she would not steer so well when loaded to the greater draft, but was more apt to sheer, and was more susceptible to the action of currents (Rec. pp. 147, 148, Qs. 39-49), and also stated that, loaded as she was, and down by the head, as she would necessarily be from the use of coal and water, she was apt to become unmanageable, and therefore was not safe to take into the canal (Rec. p. 150, Q. 65).

This drag or deep-stern loading was necessary in order to make her handle and steer properly (Hart, Rec. pp. 418, 419, X-Qs. 139-141, 143-147; Shelton, Rec. p. 477, X-Qs. 323-327; J. W. Maker, Rec. pp. 358, 359, X-Qs. 61-69, 79; B. Kemp, Rec. p. 391, X-Q. 44).

Pilot Lewis, an eye-witness of the first day's events, testified that the *Bay Port* steered "kind of bad" after reaching the canal, sheering just before she got to the railroad bridge on entering the canal, and again sheering to port before taking the sheer to starboard on which she stranded (Rec. pp. 159, 160, Qs. 15, 18, 22, 25).

The first assignment of error alleged by White Oak Transportation Company is not, therefore, supported by the record, and the Circuit Court of Appeals did not err in finding that White Oak Transportation Company was at fault in allowing the *Bay Port* to enter the canal.

(d) Any error such as is alleged by the petitioners in this respect would be harmless.

But, assuming that the Circuit Court of Appeals did err in this respect, as alleged by White Oak Transportation Company, the error was not prejudicial to the petitioner, and should therefore be disregarded.

Both lower Courts ruled that White Oak Transportation Company was not responsible for any injury arising from the first stranding. The liability which the Circuit Court of Appeals held to have attached to White Oak Transportation Company was by reason of the fact that—

"While, when she entered the canal upon the

previous day, we think the Canal Company assented to her navigation of the canal in the condition in which she then was, we do not find any evidence that the Canal Company assented to her undertaking the navigation of the canal in the condition in which she was when she slid off the bank; . . .” (Rec. p. 554).

“Looking at the situation [after the first stranding] as it is presented by the evidence and not in the light of subsequent events, we think that he [Captain Hammett] was negligent in allowing his vessel to proceed before she was pumped out and her cargo adjusted” (Rec. p. 556).

In its second opinion the Circuit Court of Appeals stated that—

“The second stranding of the steamer we have found was occasioned by the negligence of the captain of the Bay Port in attempting to navigate the canal with a vessel which was partially filled with water and down by the head to such an extent that it sheered badly. We have found that the Canal Company did not consent to the navigation of the canal by the Bay Port in her then condition and that the owners of the Bay Port are liable to the Canal Company for whatever damages it may have sustained by reason of the attempted navigation by the Bay Port in her disabled condition.

“We think that the Bay Port, when her hold was filled with water above her cargo and she had a bad list to port and was down by the head, was much more liable to sheer than when she entered the canal; that she had become altogether a differ-

ent vessel from what she was when she entered the canal, in respect to her liability to sheer; and that it was the attempt to tow her when in this condition, when, as described by the captain of the tug boat which had her in tow, she went—

“ ‘from one side to the other of the canal after she came off; that she would dive from one side to the other, and this was true all the way until she struck’,—

“ ‘which was the proximate cause of her loss and of the loss of the cargo’ ” (Rec. p. 573).

It is manifest, therefore, that any negligence upon the part of White Oak Transportation Company in taking the *Bay Port* into the canal was not found to be the proximate cause of the loss of the vessel or cargo, or of the injury to the canal. This being so, even assuming that the Circuit Court of Appeals was in error upon this point, it was harmless error. It was harmless also for the reason that the Canal Company was found free of negligence upon both days, and the injury to the canal was found to have been due solely to the *Bay Port's* navigation of the canal upon the second day. Being harmless, it is not a sufficient basis for reversal.

E.

The Circuit Court of Appeals rightly ruled that neither White Oak Transportation Company nor Northern Coal Company was entitled to recover damages from the Canal Company for either stranding.

The two paragraphs from the opinion of the Circuit Court of Appeals which have been quoted and specifi-

cally dealt with hereinbefore in the argument directed to the failure of the petitioners to sustain the burden of proof are also urged by White Oak Transportation Company as the basis for its second assignment of error, and for the contention that the Circuit Court of Appeals, having found the Canal Company guilty of contributory negligence, therefore erred in not applying the admiralty rule of divided damages in case of mutual fault, and in applying the common-law rule which denies recovery under such circumstances. This assignment of error is also based upon the assumption that the Circuit Court of Appeals found that the allowing of the *Bay Port* to enter the canal was the proximate cause of both strandings. As has been stated hereinbefore, however, a careful reading of the opinions of the Circuit Court of Appeals shows that White Oak Transportation Company is in error in making this contention. The Circuit Court of Appeals, in the two paragraphs referred to, was discussing "assumption of risk" and not "contributory negligence" upon the part of the Canal Company. The finding that the Canal Company assumed the risk of injury to its canal from the *Bay Port's* entering the canal in the condition in which she was on the first day, does not involve the application of the "divided damages" rule. Such rule operates only when contributory negligence exists.

In order to apply the rule of divided damages, negligence chargeable against the respondent and contributing to the injury as a proximate cause thereof must first be found, and, if none is so found, there is nothing upon which the rule can operate.

In *The Pennsylvania* (1873), 19 Wall. 125, at page

136, upon which case White Oak Transportation Company will probably rely, it is stated that—

“It must be conceded that if it clearly appears the fault could have had nothing to do with the disaster, it may be dismissed from consideration.”

Again in Marsden's Collisions at Sea (7th ed.), at page 27, it is said that—

“Negligence such as will attach liability cannot be established merely by showing that, but for a previous improper act of the defendant, the collision would not have occurred. The act complained of ‘must have some proper connection, as a cause, with the damage which followed, as its effect’. Whether this proper connection exists between the act complained of and the loss is a question of fact.”

The gist of the action in admiralty, as in common law, is negligence.

The Circuit Court of Appeals, as did the District Court, carefully distinguished between the happenings of the first and those of the second day, and both Courts found that the events of the first day were not the proximate cause of those of the second day.

Both lower Courts also found that the Canal Company was not responsible for the first stranding, and they necessarily found, therefore, that the allowing of the *Bay Port* so to enter the canal was not the proximate cause of the first stranding, nor of the loss of the *Bay Port* or its cargo.

If, then, as found by the Circuit Court of Appeals, the petitioners failed to establish any negligence

against the respondent which caused the first stranding, there was no occasion for the application of the divided-damages rule, and hence the Circuit Court of Appeals did not err, as set forth in *White Oak Transportation Company's* second assignment of error, in not applying that rule.

F.

The Circuit Court of Appeals rightly held that the existence of the two shoals in the canal was not the proximate cause of either stranding.

Where, in a given case, the facts are not disputed, the Court will sometimes rule, as a matter of law, that certain facts establish negligence, and constitute the proximate cause of an injury. But where facts are in dispute it is clearly a question of fact, to be determined by a jury, if there is one, otherwise by the Court, whether or not a party is negligent, and whether or not any such negligence, if established, is the proximate cause of the injury complained of.

In these cases there was ample evidence to the effect that neither shoal in any way caused either stranding.

1. IF ANY SHOAL EXISTED AT STATION 242 OR FARTHER WEST IN THE CANAL, NEITHER THAT SHOAL NOR ANY EFFECT THAT IT MIGHT HAVE HAD UPON THE NAVIGATION OF THE BAY PORT ON THE FIRST DAY WAS THE PROXIMATE CAUSE OF EITHER STRANDING.

Upon all the evidence the shoal alleged to exist about Station 242 on December 13, 1916, terminated easterly at about Station 242 (*Bay Port* Exhibit 1, Rec. p. 244), 1200 feet west of the point where the *Bay Port's* bow struck upon the south side of the canal

at Station 230 (Crocker, Rec. p. 245, X-Qs. 140, 144; *Bay Port* Exhibit 2, Rec. p. 244). It was uncontradicted that from Station 241 to Station 230 there were at all points in the channel on November 20, 1916, and therefore presumably on December 13th, at least 25 feet of water at mean low water, and in most places over 30 feet (*Bay Port* Exhibit 1, Rec. p. 244; Crocker, Rec. pp. 236, 237, Qs. 21, 31).

For White Oak Transportation Company to maintain that the shoal at Station 242 was the proximate cause of the first stranding it must, in effect, maintain that the *Bay Port* was out of control from the time she approached or crossed that shoal until the time she struck the south bank. The testimony, however, shows that she was not out of control for that distance, and that from Station 242 to Station 230 there was at all points in the canal a depth of at least 25 feet at mean low water. All the testimony is to the effect, also, that the *Bay Port* sheered a little to port at about Station 242, the witnesses called by the Canal Company, including Pilot Rochester, testifying that she sheered to port in deep water before she reached this shoal (W. T. Lewis, Rec. pp. 159, 160, 184, Qs. 15-25, 344, 345; Rochester, Rec. p. 259, Qs. 45-48; p. 267, X-Q. 142); Rochester, however, stated that she did not sheer on the shoal (Rec. p. 267, X-Qs. 141, 142). No witnesses, not even those for White Oak Transportation Company, testified that she sheered to port further east than Station 242 (Hammett, Rec. p. 428, Q. 86). In fact, the sketch offered by Professor Reeve, based upon Captain Hammett's and other evidence, indicates Station 242 as the point at which she sheered (Reeve, Rec. p. 496, Q. 22; *Bay Port* Exhibit 16, Rec. p. 499).

(a) *That this shoal caused any sheer was not established.*

There is grave question whether such shoal caused any sheer. The witnesses offered by White Oak Transportation Company testified that if, at a speed of 5 knots, the *Bay Port* had under her 4 to 5 feet of water, she would not sheer (J. W. Maker, Rec. p. 359, Qs. 75, 76; Dunton, Rec. pp. 421, 422, Q. 39). On December 13, 1916, the tide was high at 12 o'clock noon (Rec. pp. 62, 72, Ints. to Canal Co. 74). The tide began flowing west at 11.50 a.m. At 2.15 p.m. there was a rise of tide of 4 feet at the point where she struck (Rec. pp. 62, 72, Ints. to Canal Co. 76; Crocker, Rec. p. 253, X-Qs. 210, 211).

Clearly, then, inasmuch as the soundings on the shoal did not show less than 19 feet 3 inches in any place, and in most places showed more (*Bay Port* Exhibit 1, Rec. p. 244), there was at least 23 feet 3 inches of water at every point on the shoal. This would allow 5 feet 1 inch of water under the *Bay Port*, which would be ample water for her to navigate without "smelling the bottom." In fact, the mate said he never knew a whaleback to sheer in water 22 feet deep (Shelton, Rec. p. 472, X-Qs. 251, 252).

(b) *Any sheer which might have been taken at or near the locus of the shoal was corrected.*

But, even assuming that this shoal did cause a sheer to port, that sheer was but slight, and of little consequence (Hart, Rec. p. 412, Qs. 50, 51; Hammett, Rec. p. 428, Q. 87; p. 440, X-Qs. 309-314), and could not have had anything to do with her striking the south

bank 1200 feet farther east, for all the witnesses testifying upon this point stated that the vessel speedily straightened out (Hammett, Rec. p. 428, Q. 91; W. T. Lewis, Rec. p. 160, Q. 22). Professor Reeve, the expert on hydraulics, called by White Oak Transportation Company, on cross-examination stated that when the *Bay Port* left the shoal, the shoal itself would correct any such sheer that she might have taken, and that the effect of the sheer would thereupon be terminated (Reeve, Rec. p. 504, X-Qs. 75-80).

Any effect that the shoal might have had, therefore, was lost when the *Bay Port* crossed it, and any sheer which might have been caused by such shoal was corrected. If any factor intervened thereafter and caused the later sheer of the *Bay Port*, clearly the shoal was not the proximate cause of her stranding.

The maxim *causa proxima non remota spectatur* applies to distinguish negligence for the consequences of which a defendant is liable from that which is merely collateral and immaterial upon the question of liability. Negligence such as will attach liability cannot be established merely by showing that, but for a previous improper act of the defendant, the accident would not have occurred. The act complained of must have some proper connection, as a cause, with the damage which followed, as its effect.

The Maryland (1884 D.C.), 19 Fed. 551.

The Sam Rotan (1884 D.C.), 20 Fed. 327.

The E. A. Packer (1884 D.C.), 20 Fed. 339.

Chicago, B. & Q. R. Co. v. Richardson (1913 C.C.A.), 202 Fed. 836.

“An action will not lie where the loss, although arising from an unlawful or negligent act of the defendant, does not flow from it, and was not the reasonable, probable, or likely result of it.”

Clark v. Chambers, 3 Q.B. D. 327.

(c) *The Bay Port*, from Stations 242 to 230, was out of the center of the channel, and “hanging” to the right bank.

L. Maker, the helmsman of the *Bay Port*, stated that this first sheer was not so much of a sheer as a “hanging to the bank,” testifying as follows:

“Q. 23. What was the first you noticed of any appreciable sheer that day? A. Just before we ran ashore we took a sheer to port, a small sheer; it wasn’t so much of a sheer as hanging to the bank, that way, you know; and she wouldn’t come out, wouldn’t answer her wheel.

“Q. 24. Wouldn’t come out from the bank? A. No, sir. It wasn’t exactly a sheer. But when she did let go, she went on a rank sheer to the starboard.

“Q. 25. To the starboard side? A. To the starboard bank” (Rec. p. 484).

“Q. 28. Now, when she took this rank sheer to the south bank,—that is, to your starboard—what did you do? A. I put the wheel over as the pilot told me.

“Q. 29. Just tell what happened. Did she mind her helm? A. No, sir; she kept on going, and we

got the wheel hard over, and she stopped swinging but she was too far gone to come back" (Rec. p. 484).

.
 "X-Q. 161. In reply to Mr. Blodgett you said that the first day she would not come off the bank. That was just previous to her taking this rank sheer? A. Yes, sir.

"X-Q. 162. What did you mean by that expression that she would not 'come off the bank'. In the first place, how near the bank was she? A. Well, I couldn't tell you, but I know she was some little distance out,—out of the centre.

"X-Q. 163. Towards which bank? A. Towards the port bank and running along parallel with it.

"X-Q. 164. How far out of the centre was she? A. She wasn't more than her width.

"X-Q. 165. And how wide was she? A. Well, say 50 feet out of the centre towards that bank, and she wouldn't swing away from it.

"X-Q. 166. She didn't sheer at that time, but she just clung to the bank, and you could not get her away? A. Clung to the bank" (Rec. p. 493).

Pilot Rochester stated that the shoal had nothing to do with her stranding, the *Bay Port* being too far beyond it, and that nothing but this rank sheer, the cause of which he did not know, caused the stranding (Rec. p. 267, X-Qs. 137-143).

(d) *The failure of the Bay Port to regain the center of the channel while proceeding about 1000 feet or more was negligent.*

The failure to take any precaution to regain the center of the channel after being set over 50 feet from the center (the channel being but 100 feet wide), and the navigation of the canal on that line for over 1000 feet, was clearly negligent. Whether the negligence was that of the pilot, master, or helmsman, it is chargeable to the owner, and caused the first stranding.

As was said in another case relating to the Cape Cod Canal:

“It might well have been negligence on their part to allow themselves to get into any part of the canal where water deep enough . . . could not reasonably have been expected.”

Boston, C.C. & N.Y. Canal Co. v. Staples Trans. Co. (1917 C.C.A.), 246 Fed. 549.

It was pointed out by the District Court that no effort was made to slow up the *Bay Port* or to pull her over, or to cause her to drift over into the center of the channel, which could and should have been done if she had been affected by the shoal, or if it had been believed that she was in danger, before rounding this turn in the canal, which was known to be a more or less difficult place to steer (Rec. p. 22).

With reference to the first shoal, at Station 242, the District Court made the following finding of fact:

“. . . It does not seem to me, however, that the facts support this contention [that the shoal was the proximate cause of the first stranding] . . .

It does not seem to me that the condition of the canal there was such as to warrant a finding of negligence against the Canal Company for permitting the Bay Port to use the canal. The Canal Company was not at fault for the first stranding, which appears to me to have been due either to pure accident, or to faulty navigation by the pilot" (Rec. pp. 22, 23).

2. IF ANY SHOAL EXISTED AT STATION 193 IN THE CANAL, NEITHER THAT SHOAL NOR ANY EFFECT THAT IT MIGHT HAVE HAD UPON THE NAVIGATION OF THE BAY PORT ON THE SECOND DAY WAS THE PROXIMATE CAUSE OF THE SECOND STRANDING OF THAT VESSEL.

(a) *There was plenty of water over this shoal for the Bay Port to navigate without "smelling bottom."*

The contention of White Oak Transportation Company that the District Court was mistaken in finding that upon this shoal the water was at least 20 feet deep at mean low water, and that there were in some places less than 20 feet of water, is controverted by Mr. Crocker, the then engineer of the canal, who testified positively that dredging had been going on at this place from November 27 until after December 14, and that there were 20 feet of water at low water, instead of the soundings which appear on the blue-prints relied upon by White Oak Transportation Company (*Bay Port Exhibits 3, 4, Rec. pp. 247-249, showing the soundings which existed before that dredging took place—W. S. Crocker, Rec. pp. 527, 528, Qs. 266, 267, X-Qs. 269, 270, 278; p. 530, X-Qs. 306, 307; Statement of Canal Company, Rec. p. 512).*

The state of the tide has been described. It had been running easterly in the canal from 6 a.m. and at 10.15 a.m., when the *Bay Port* floated, the water which would result from the rise of the tide on this shoal, assuming the water over the shoal to be 20 feet at mean low water, and the rise of the tide 6 or 7, would be at least 3 feet, and probably more (W. T. Lewis, Rec. p. 180, X-Qs. 286, 287; Rec. pp. 62, 72, Ints. to Canal Co. No. 77), making at least 23 feet of water over this shoal at that time. Various witnesses, including J. W. Maker and B. Kemp, both witnesses for the Scott Company, testified that a depth of from 3 to not over 5 feet of water was sufficient for the *Bay Port*, at a speed of 5 knots, to navigate without "smelling the bottom" (J. W. Maker, Rec. p. 359, Q. 75; B. Kemp, Rec. p. 393, X-Qs. 60, 61). Neither Kemp nor Maker put the requirement above 5 feet, the witness Kemp putting it as low as 3 feet, and also testifying as follows:

"The Court. Of course, if the vessel is practically drifting, as long as there is water under her at all it does not affect the steering?

"The Witness. It does not affect her,—none at all" (B. Kemp, Rec. p. 393, X-Q. 60).

Shelton, to the same effect, Rec. pp. 472, 473, X-Qs. 259-262.

Upon all the testimony there was ample water over this shoal for the proper navigation of the *Bay Port*, even at a 5-knot speed. Furthermore, it was the uncontradicted testimony of Pilot Lewis that her engines were stopped and that she was drifting, in which case she would require but sufficient water to float her, and not 5 feet (Rec. p. 164, Q. 69).

(b) *That this shoal caused any sheer was not established.*

There was testimony to the effect that the *Bay Port* sheered before she got to this shoal. Pilot Lewis testified that she was sheering badly from side to side from the time she floated; that she sheered west of the shoal, at a point where there was 40 or 50 feet of water, and that she straightened out on the shoal (Rec. p. 164, Q. 69; p. 184, Qs. 349-351; p. 183, X-Q. 334).

Her condition, control, and method of proceeding has been partly set forth. In addition to Pilot Lewis, whose testimony has been mentioned, the witness Donnelly stated that "practically from the time she got afloat she was sheering" (Rec. p. 217, Qs. 45, 46). Wagner testified to the same effect (Rec. p. 228, Q. 38). J. Kemp stated that, being down at the head, with her engines working, her stern would swing one way or another (Rec. p. 325, X-Qs. 68-73). The helmsman testified that for the first third of a mile she could not be steered at all, but just drifted (L. Maker, Rec. pp. 488, 489, X-Qs. 102-105, 111, 120).

There is therefore nothing upon which to base the claim that this shoal of itself caused any sheer.

(c) *Any sheer taken at or near this shoal was corrected.*

All the witnesses called by the petitioners, testifying on the point, stated that the sheer taken at or near the dredge *Trilby*, which was at work on this shoal, was corrected (L. Maker, Rec. p. 486, Qs. 61, 62; Shelton, Rec. p. 476, X-Qs. 308-315; Hammett, Rec. p. 432, Qs. 176, 177), and if she did sheer upon the shoal it is im-

material to the issue. Even by the soundings as shown upon the blue-prints (*Bay Port* Exhibits 3, 4, Rec. pp. 247-249) which were made August 17 and November 18, 1916, respectively, *i.e.*, before the shoal was dredged to 20 feet, the eastern end of the shoal was west of Station 190.50 so that the distance from Station 190.50 to Station 169, where she struck (*Bay Port* Exhibit 7, Rec. p. 252), was 2150 feet; and from Station 193 to Station 169 was 2400 feet.

Clearly, then, upon the same reasoning as applied to the shoal at Station 242, and to the first stranding, this shoal was not the proximate cause of the second stranding.

This is supported and borne out by the fact that, according to her second officer, the sheer upon which the *Bay Port* stranded lasted for less than one half her length (Hart, Rec. p. 417, X-Qs. 120, 121), and this witness did not notice any sheer to starboard (as was the sheer near the *Trilby*), just prior to the sheer to port which caused the stranding (Rec. p. 414, Q. 89; p. 416, Q. 110, X-Q. 113). It is also corroborated by the fact that the evidence of the helmsman, from whose statement the log was made up, is to the effect that the *Bay Port* would not answer her helm (L. Maker, Rec. p. 492, X-Q. 154). The helmsman's statement is the best evidence of what actually happened, as the man at the wheel ordinarily has the most vivid impressions of anybody as to what takes place in connection with the action of his boat.

The Natchez, 78 Fed. 183.

The Sam Sloan, 65 Fed. 125.

With reference to the shoal at Station 193, the District Court found as a matter of fact that—

“About two thousand feet west of where the *Bay Port* finally landed, she passed over a shallow spot much like that above described in connection with the first stranding. There was everywhere on it, except close to the sides of the channel, twenty feet of water at mean low tide; and at the time of the accident,—the tide being about half up,—about three feet more, i. e., about twenty-three feet. It is contended by the owner of the *Bay Port* that the shoal caused her to sheer and was the proximate cause of the accident; and that the Canal Company is therefore liable. This shoal was farther from the place of the final accident than the first shoal was from the first accident. Throughout the intervening distance there was at least twenty-five feet of water at mean low tide. Two separate sheers were taken and broken after passing the shoal before the steamer finally struck. It seems to me that even if the shoal be regarded as a negligent obstruction in the canal, it was not the cause of the accident.

“From what has been said, it follows that the charges of negligence against the Canal Company by the Transportation Company have not been sustained, and that the libel against it must be dismissed” (Rec. p. 25).

With reference to these two shoals the Circuit Court of Appeals, in affirming such finding of fact, stated that—

"The learned Judge of the District Court has found that, while there was a less depth of water than twenty-five feet near the places in the canal where the two strandings occurred, there were from twenty-one to twenty-two feet of water on the shoal over which the Bay Port passed before the first stranding and twenty-three feet or more on the shoal passed over by her before the second; and that, as her greatest draft was a little over eighteen feet, the contention of her owners that she 'smelled the bottom' and was caused to sheer by the shoal water was not sustained; and that, assuming that these shoals caused her to sheer, they were so far distant from the places where the vessel stranded, they were not the proximate cause of her stranding in either case, as she had passed the shoal before the first stranding by about 1,000 feet, and by about 2,000 feet before the second, and for the whole of each of these distances there was a depth of more than twenty-five feet of water in the channel . . . and that the condition of the canal here did not warrant a finding of negligence against the Canal Company.

"We think these findings are sustained by the evidence. The grounds on which they are based are so fully stated in the careful opinion of the learned District Judge that it is unnecessary to add anything to the reasons which he has given" (Rec. p. 551).

This finding was repeated in the second opinion of the Circuit Court of Appeals (Rec. p. 573).

The Circuit Court of Appeals therefore committed

no error, as set forth in White Oak Transportation Company's assignment of error, in not ruling as a matter of law that the shoals were the proximate cause of both strandings. Since both Courts have concurred in the finding of fact that neither shoal was the proximate cause of either stranding, that finding is not erroneous, but is based upon evidence amply sufficient to justify it, and this Court ought not to set it aside.

The Germanic (1905), 196 U.S. 589.

The Iroquois (1904), 194 U.S. 240, 247.

The Carib Prince (1898), 170 U.S. 655, 658.

Campania La Flecha v. Brauer (1897), 168 U.S. 104, 123.

G.

The Circuit Court of Appeals rightly held that the first stranding was not the proximate cause of the second stranding.

The contention of the petitioners that the first stranding was the proximate cause of the loss of the vessel and cargo has been disposed of in the argument directed to the previous assignment of error. The District Court and the Circuit Court of Appeals having concurred in the finding that the first stranding was not the proximate cause of the second stranding, and such finding resting upon evidence more than sufficient to justify it, no error was committed as set forth in the petitioners' fourth assignment of error, and the finding of the Circuit Court of Appeals thereon ought not be disturbed.

H.

The Circuit Court of Appeals rightly held that the Canal Company was free from liability for the total loss of cargo on the second day, and rightly dismissed the intervening petition of Northern Coal Company.

It has been argued hereinbefore that the first stranding was not the proximate cause of the loss of the vessel or her cargo. In order, therefore, to place responsibility upon the Canal Company for the loss of the cargo on the second stranding, it must be shown that negligence on the part of the Canal Company occurring after the first stranding was the proximate cause of the second stranding. The contention that the existence of shoals in the canal caused the strandings has already been disposed of in the argument directed to the third assignment of error by White Oak Transportation Company. In that argument it is pointed out that both lower Courts concurred in finding that neither shoal was the cause of either stranding, and that these findings were amply supported by the evidence.

Furthermore, it was expressly found by the Circuit Court of Appeals, in reversing the decree of the District Court that—

“The second stranding of the steamer we have found was occasioned by the negligence of the Captain of the Bay Port in attempting to navigate the canal with a vessel that was partially filled with water, and down by the head to such an extent that it sheered badly” (Rec. p. 573).

This finding of the Circuit Court of Appeals also was

entirely justified by the record, and will be more fully discussed hereinafter.

In view of this finding that the second stranding was occasioned by the negligence of the captain of the *Bay Port*, and in the absence of proof of negligence on the part of the Canal Company, which was the proximate cause of the second stranding, it is apparent that no error was committed in ruling that the Canal Company was free from liability for the loss of the cargo on the second stranding, and the intervening petition of Northern Coal Company was rightly dismissed.

The dissenting opinion of Anderson, J., filed with the majority opinion of the Circuit Court of Appeals, upon Northern Coal Company's motion to amend the District Court decree is in direct conflict with that majority opinion. Anderson, J., agreed with the other members of the Court in the first opinion, that the Canal Company was guilty of no negligence which was the proximate cause of either the first or second stranding. That being so the Canal Company was held not responsible for the loss of the cargo. The second opinion of Anderson, J., ought not, therefore, be considered as against the majority opinion of the Court.

I.

The Circuit Court of Appeals was right in not ruling, as a matter of law, that the Canal Company, to avoid liability, must prove that said shoal spots not only did not cause, but could not have caused, the two strandings, or either of them.

The Massachusetts Statute (Acts 1899, c. 448) providing for the construction of the canal provided that—

“said canal when constructed shall have a depth of not less than 25 feet at mean low water.”

The petitioners erroneously contend that at the time of the two strandings of the *Bay Port* there were shoal spots in the canal having less than 25 feet of water, and that such was a violation of the Canal Company's statutory duty, which immediately threw upon the Canal Company, in order to avoid liability, the obligation of proving that such shoal spots not only did not cause, but could not have caused, either stranding of the *Bay Port*.

1. THE STATUTE IN QUESTION WAS NOT VIOLATED BY THE CANAL COMPANY.

The uncontradicted evidence was to the effect that the canal when completed did have a depth of 25 feet at mean low water, which was a full compliance with the provisions of the statute, and that any shallower depths at the time of the *Bay Port's* stranding were the results of shoaling (a natural phenomenon) after the terms of the statute had been complied with, and did not, therefore, constitute a violation of the statute (Belmont, Rec. p. 541, X-Qs. 33-35).

2. THIS BURDEN OF PROOF, IF IMPOSED UPON THE CANAL COMPANY, WAS SUSTAINED.

Whether the canal statute was violated or not, in respect of these shoals, both the District Court and the Circuit Court of Appeals concurred in the affirmative finding that neither of the shoal spots complained of by the petitioners was the proximate cause of either of the two strandings (Rec. pp. 22, 23, 25, 551, 573), and

any burden of proof placed upon this respondent with reference to absolving itself from any culpability for any alleged violation of that statute was therefore sustained.

The Circuit Court of Appeals therefore committed no error in not applying the rule contended for by the petitioner.

3. THE RULE SET FORTH IN *THE PENNSYLVANIA*, 19 WALL. 125, DOES NOT APPLY IN THIS CASE.

This rule, which White Oak Transportation Company contends should be applied here, as the Court specifically stated in the case of *The Pennsylvania*, applies only to statutes, ordinances, and rules covering the navigation of vessels, which are designed to prevent collisions of vessels. It does not apply to such a statute as is here presented.

The case of *The Pennsylvania* involved a collision in a dense fog between the bark *Mary Troop* and *The Pennsylvania*, the *Troop* being under way without using her foghorn, "in plain violation of rules of navigation." This Court, in laying down the rule in such case, at page 136, said:

"But when, as in this case, a ship at the time of a collision is in actual violation of a statutory rule intended to prevent collisions, it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributory cause of the disaster. In such a case the burden rests upon the ship of showing not merely that her fault might not have been one of the causes,

or that it probably was not, but that it could not have been."

The cases relied upon by the petitioners in support of this contention are not in point. The case of *Lie v. San Francisco & P. S. Co.*, 243 U.S. 291, involved a collision in a fog between the steamers *Selja* and *Beaver*. The *Selja*, upon hearing the fog signal of the *Beaver*, did not stop her engines, as required by Article 16 of the Act of Congress of August 19, 1890, applying to the international regulations for preventing collisions at sea.

The case of *The Thielbek*, 241 Fed. 209, involved a collision between the steamer *Fagelund* and the bark *Thielbek*, which was being towed. The *Fagelund*, at the time having the tow on its starboard side and approaching it obliquely, attempted to cross the bow of the tow, in violation of Rule 7 of the Pilot Rules.

The case of *The Ellis*, 152 Fed. 981, involved a collision between the steamers *Ellis* and *Galicla*. The *Ellis*, going down a western river, gave the first passing signal, in violation of Rule 1, Governing Pilots on Western Rivers, which provided that the pilot of the ascending steamer should give the first passing signal.

The case of *The Dauntless*, 121 Fed. 420, involved a collision between the *Dauntless*, going down a river, and two steam launches going up. The *Dauntless* attempted to pass them near the left bank of the river, in violation of Article 25 of the Act of Congress, June 7, 1897, "for preventing collisions upon certain har-

bors, rivers, and inland waters of the United States," providing that a vessel situated as was the *Dauntless* should keep to the right side of the river.

All these cases, therefore, fall into that class in which a rule of navigation intended to prevent collisions of vessels is violated, such as—

The International Rules of Navigation (29 Stat. 885), for preventing collisions, "to be followed by all public and private vessels."

The Inland Rules (30 Stat. 96), for preventing collisions, "to be followed by all vessels navigating all harbors, rivers, etc."

The Lake Rules (28 Stat. 645), for preventing collisions, "to be followed by all public and private vessels."

The Mississippi Valley Rules (Rev. Sts. sec. 4233), for preventing collisions, "to be followed by vessels of the navy and of the mercantile marine."

It is therefore only a violation by a "vessel" of these rules "intended to prevent collisions," that places upon such offending "vessel" the burden of proving that such violation not only did not cause, but could not have caused, the collision. The rule does not apply to other statutes, which do not in any way involve vessels or their navigation. The statute providing for the construction of the canal and its depth upon completion does not, therefore, fall within the rule of *The Pennsylvania*.

In the case of the canal statute here involved the usual test is to be applied, viz., if a statute has been

violated by a defendant, did such violation constitute the proximate cause of the injury?

“The mere fact that the plaintiff, on the one hand, or the defendant on the other, was engaged in violating the law in a given particular at the time of the happening of the accident, will not bar the right of action of the former, nor make the latter liable to pay damages, unless such violation of law was an efficient cause of the injury.”

Thompson, Commentaries on the Law of Negligence (1901), sec. 82 (and cases cited).

Todd v. Traders & Mechanics Ins. Co. (1918), 230 Mass. 595, 598.

Field v. Gowdy (1908), 199 Mass. 568, 573.

Newcomb v. Boston Protective Dept. (1888), 146 Mass. 596, 604.

Lane v. Atlantic Works (1872), 111 Mass. 136, 140.

See also *Boston & Maine R.R. v. Hooker* (1913), 233 U.S. 97, 151, 152.

Phil., W. & B. R.R. Co. v. P. & H. deG. S. T. Co. (1859), 23 How. 209, 217, 218.

The Circuit Court of Appeals therefore committed no error, as set forth in White Oak Transportation Company's fifth assignment of error, in not applying the rule contended for by the petitioner.

J.

The Scott Company, or owner, or both, by their agents or employees, were negligent in the care of the Bay Port while upon the bank, and in allowing her to slide off in an improper and unsafe condition for navigation, while either or both were unprepared to care for her in such event.

While both lower Courts held that The T. A. Scott Company, Inc., was not responsible for the second stranding, yet the respondent submits that, if this Court review the whole case, it might well find that the negligence of The T. A. Scott Company, Inc., in the case of the *Bay Port* while ashore contributed to the second stranding.

1. THE SCOTT COMPANY WAS EMPLOYED BY THE OWNER TO FLOAT AND DELIVER THE VESSEL TO IT, THE OBLIGATION TO THE CANAL COMPANY BEING TO USE DUE CARE IN THAT OCCUPATION.

In consequence, the Scott Company sent their wreck-master, Captain Joseph Lewis (who is to be distinguished from Pilot William T. Lewis). He arrived on the scene about 6.45 p.m., December 13, and took charge of the operations to float the vessel, and to deliver her afloat to her owner. During the operations Captain Hammett retained command of his vessel and crew. The three tugs that were on the spot at the time he arrived were delivered into his control by Captain Geer, as manager of the Cape Towing Corporation, for such use as he might desire to make of them (Geer, Rec. p. 404, Q. 96; Lecompte, Rec. p. 235, Qs. 19, 32). That situation continued at least up to the time that she floated.

Captain Joseph Lewis gave directions to the tug captains to stand by the *Bay Port* during the night, and to keep their noses right on the *Bay Port* and keep her up on the bank—"and not let her get off there" (W. T. Lewis, Rec. p. 202, Q. 42; Canal Co. Exhibit 16; Le-compte, Rec. p. 237, Qs. 34-36).

Whether or not the work was strictly one of "salvage," as "salvage" is interpreted in the decisions, is a question. In one case the following language appears:

"The work performed by the libellant, though skillful in execution and successful in result, was in no sense a salvage service. It had in it no element of danger to person or property, which is the principal factor relied on in sustaining large awards in salvage cases.

"The problem of raising the sunken dredge was an exceedingly simple one; no new or difficult questions were presented for solution. The sinking occurred in summer, no storm was raging, the water was comparatively shallow, the bottom was soft mud. The moment the wreckers saw the situation they knew exactly what to do."

Merritt & Chapman &c. Co. v. Morriss & Cummings Dr. Co. (1905 C.C.A.), 137 Fed. 780.

The Paul L. Bleakley (1906 D.C.), 146 Fed. 570.

Gilchrist v. Godman (1897 D.C.), 79 Fed. 970.

Even assuming that the Scott Company's relations

to the owner were those of a contracting salvor, as such it must use due care in its operations.

Serviss v. Ferguson, 84 Fed. 202.

The Henry Steers, Jr., 110 Fed. 578.

The S. C. Schenk, 158 Fed. 54.

The Scott Company, through Captain Joseph Lewis, sent a diver down at about 5.15 a.m. December 14, and the hole was plugged with wedges. The pumps then gained on the water in the vessel (Canal Co. Exhibit 16). The tugs, at Captain Joseph Lewis' orders, had been carrying out various errands, and the Scott Company's wrecking lighter *Salvor* had been placed upon the port side of the *Bay Port* for the purpose of lightering coal from the *Bay Port* (W. T. Lewis, Rec. p. 203, Q. 51; Lecompte, Rec. pp. 235, 237, Qs. 19, 37; Wagner, Rec. p. 279, Qs. 23-26). The tide had been running east since 6 a.m. (*Bay Port* Exhibit 8). About 10.15 a.m. the *Bay Port*, being headed east, slid off the bank, and floated eastward through the canal.

2. THE TUGS WERE IMPROPERLY PLACED, EITHER TO HOLE THE BAY PORT AGAINST THE BANK, OR ADEQUATELY TO CARE FOR HER AFTER SHE FLOATED.

The positions of the tugs *Hazelton* and *Dalzelline* at the time the *Bay Port* slid off are, in effect, agreed upon, by all the witnesses testifying upon the point, as being off the port bow of the *Bay Port*, with the drift of the tide, and hanging on by a single line, headed west and to the tide (W. T. Lewis, Rec. p. 204, Q. 58; p. 210, X-Qs. 125-131).

The position of the tug *John C. Stuart* at the moment of the *Bay Port's* floating is in dispute. She is placed

outside the *Salvor* and headed west by the following witnesses: W. T. Lewis (Rec. p. 204, Q. 56; p. 210, X-Qs. 125-131); Smith (Rec. p. 285, Qs. 24, 25); Lecompte (Rec. p. 236, Q. 29). The following witnesses place her on the port quarter of the *Bay Port*, possibly overlapping the *Salvor*; Daly (Rec. p. 429, Q. 24); Brennan (Rec. p. 468, Q. 16); Wagner (Rec. p. 282, X-Q. 62). Captain Hammett of the *Bay Port* places her outside the *Salvor* (Rec. pp. 526, 527, X-Qs. 395-401).

Undoubtedly the *Stuart* was outside the *Salvor*, headed west, when the *Bay Port* slid off. The engines of the *Stuart* were not running, nor were the engines of the other tugs running (W. T. Lewis, Rec. pp. 204, 205, Qs. 61-63; Lecompte, Rec. p. 236, Qs. 30, 31).

3. THE BAY PORT WAS NOT MADE FAST TO THE BANK TO PREVENT HER GETTING AWAY BEFORE THE SCOTT COMPANY OR THE OWNER WAS READY.

The evidence in relation to what could have been done to prevent her going off is very clear. Captain Joseph Lewis, in his statement and report to the Scott Company, stated that during the night the tugs were ordered by him to hold her against the bank (Canal Co. Exhibit 16). There is no suggestion in his report as to why that could not have been continued the next day. There is no suggestion, one way or the other, in the answers to the interrogatories, as to any orders in relation to the tugs that were given the next day. In fact, in answer to the question as to what orders Captain Joseph Lewis gave December 14, in relation to the tugs, the answer is that he gave no orders (Rec. pp. 8, 18, Int. to Scott Co. 41). That is, the night before

he decided, and ordered, that, for the safety of the vessel, the tugs be so placed as to hold her against the bank. The next day they were not so employed; he gave no orders in relation to that the next day. Mr. Davis, one of the expert wreckers produced by the Scott Company, in cross-examination said that there was no reason why the tugs should not have held her in position against the bank the morning of December 14, in the same way that they had been doing during the night (Rec. p. 443, X-Qs. 42, 43).

The only excuse that has been suggested as to why this was not done is that there were some boulders there, and she might be further punctured if they held her there (A. J. Davis, Rec. p. 440, Qs. 17, 18). The Scott Company had worked in the canal for two or three years removing boulders, and had cared for other wrecked vessels in the canal (T. A. Scott, Rec. p. 364, Qs. 38-45). They knew the night before that there were boulders there. They had no further knowledge in relation to those boulders the next morning. But, assuming that they did, the witness testified that, holding her in the way that they did, it was just the same as holding your fist steadily against your hand; that, if it was a steady pressure, not violently exerted, there would be no probability of any puncture of the boat, there being no sea to take into consideration, and the tendency of the current being to pull her away from the bank rather than to set her on it (A. J. Davis, Rec. pp. 444, 445, X-Qs. 44-53).

We have, therefore, the situation, in relation to the Scott Company, that the night before they determined the proper course to pursue, viz., that the tugs should hold her against the bank; and for no good reason

(their own witness Davis testifying in effect that it was not a good reason) they discontinued it the next morning. The only explanation for the discontinuance, as appears in the answers of the Scott Company to the interrogatories of the Canal Company, is that they thought that she was so firmly aground that it was not necessary (Rec. pp. 7, 18, Int. 27). In corroboration and support of this is the fact that Captain Joseph Lewis ordered the tugs on various errands on the morning of December 14 (W. T. Lewis, Rec. p. 203, Qs. 51, 52; Lecompte, Rec. p. 234, Qs. 16, 20; Wagner, Rec. p. 279, Qs. 23, 26).

Captain Kidston, called by the Canal Company, stated that making a vessel fast to the bank by hawsers and anchors was a well-recognized means of securing a stranded vessel, so that, if she floated, she could be kept under control, and that one very small anchor would be sufficient (Rec. pp. 333, 334, Qs. 14-16; p. 335, X-Qs. 30-33).

Captain Scott testified that in the case of the *Chisholm*, in an analogous situation in the canal, such method was employed (Rec. pp. 376, 377, X-Qs. 173-179; p. 370, X-Qs. 207, 208). He also testified that before she slid off there was danger of the *Bay Port* rolling down the bank and rolling over (Rec. p. 368, Q. 90). Yet no steps were taken to make her fast to the bank, which would have anticipated and prevented such an occurrence.

The witness Davis also stated that, if the *Salvor* had a full supply of anchors and cables on board (as she had per Canal Co. Exhibit 16), there was no reason why she could not have been made fast to the bank and held in control (Rec. p. 442, X-Qs. 38-40).

Captain Joseph Lewis, although the night before he thought it was proper to keep the *Bay Port* on the bank, because she might float, the next day either thought that she would not float until high water, and therefore it was not necessary, or was too busy to give the matter proper consideration, his concern principally being to lighter the coal on to the *Salvor*, and to get that matter under way (Canal Co. Exhibit 16).

If the *Bay Port* had been moored to the bank, she could have been held afloat in that position until she had been made seaworthy and ready to complete the navigation of the canal.

If the witnesses offered by the Scott Company are correct, then the *Bay Port* should have been made fast to the bank, because there was no reason why it should not have been done. It is almost axiomatic that, when a boat is ashore and the water is being pumped out of her, and her cargo is being lightered, it is impossible to tell the exact moment that she will float; and it is not the exercise of good judgment, nor the exercise of the care required of a salvor, either to the owners or to third parties, to assume that she necessarily will not float until a certain hour or a certain minute. She may float earlier or may float later, and it is too clear for argument that it is the part of good judgment, if it is possible to take precautions to insure the safety of the boat, if and when she floats, that those steps should be taken; and if they are not taken, it is negligence.

K.

The Circuit Court of Appeals was right in holding White Oak Transportation Company at fault for allowing the Bay Port to proceed through the canal after she came afloat on December 14, 1916.

1. WHITE OAK TRANSPORTATION COMPANY, BY ITS AGENTS OR EMPLOYEES, WAS NEGLIGENT IN NOT HOLDING THE BAY PORT IN DEEP WATER, AT OR NEAR THE POINT WHERE SHE SLID OFF THE BANK, UNTIL SHE WAS PUMPED OUT AND MADE SEAWORTHY AND FIT TO COMPLETE THE NAVIGATION OF THE CANAL.

(a) *The Bay Port was not in any proper condition to resume her passage through the canal.*

It is beyond any dispute that the *Bay Port*, when she came off, was not in a fit condition to attempt to navigate the canal. She came off the bank before she had been entirely pumped out. On Captain Hammett's own evidence, the water, as he put it, was a foot over the cargo in the forward part of the boat (Rec. p. 450, X-Qs. 457, 458). She was down at the head 18 inches (Hammett, Rec. p. 432, Q. 169; pp. 450, 451, X-Qs. 464-474), and 30 inches, according to Pilot W. T. Lewis (Rec. p. 164, Q. 67). She listed to port about 15 inches, according to Captain Hammett (Rec. p. 449, X-Q. 450), and 24 inches, according to Pilot W. T. Lewis (Rec. p. 164, Q. 67). The man at the wheel on both days stated that the *Bay Port*, after she came off the bank, was out of control and drifted for a third of a mile down the canal (L. Maker, Rec. p. 489, X-Qs. 103-105). Pilot Lewis testified that she sheered and drifted from side to side, and was never under control from the time she floated until the time she struck

(Rec. pp. 165, 166, Qs. 85-89); and also, on cross-examination, stated that, in the *Bay Port's* then condition, the canal was not wide enough for her to go through (Rec. p. 183, X-Q. 332). Clearly, the *Bay Port* was in no condition to navigate the canal, and it was negligent to attempt it.

(b) *The Bay Port was allowed to proceed when she might have been held by the tugs in deep water, at or near the point where she slid off the bank, until she was made seaworthy and fit to navigate the canal.*

Practically all of the witnesses agreed that there was no reason why the *Bay Port*, when she floated off, could not with the aid of the three tugs, and by reversing her engine, have been held at that spot until the water was pumped out and she was rendered fit for the further navigation of the canal (A. J. Davis, Rec. pp. 370, 371, Qs. 19, 25; Shelton, Rec. p. 471, X-Q. 241).

All the expert witnesses testifying upon this point stated that the tugs could have held her in position in deep water indefinitely, until she could be pumped out and made ready to navigate the canal (Scott, Rec. pp. 309, 310, Qs. 110-114; p. 312, X-Qs. 127-130; Robbins, Rec. p. 385, Qs. 17-21; J. Kemp, Rec. p. 325, Statement to Court; B. Kemp, Rec. p. 388, Qs. 11-14, all witnesses offered by the Scott Company, and Timmans, Rec. p. 458, Qs. 22, 23, offered by the owner).

Captain Hammett testified upon this point as follows:

“X-Q. 445. Captain, would it have been possible to have the boat in the deep water when she came off, with aid of the tugs or otherwise, before

starting down the canal? A. I think it might have been if we had wanted to.

"X-Q. 446. That could have been done if you had wanted to do it, could it not? A. If we had wanted to do it, probably" (Rec. p. 440).

Captain Scott, of the Scott Company, on cross-examination, in reply to a question as to what precautions were taken to care for the *Bay Port* in the event of her floating, testified: "the canal tugboats were there to take care of her if she floated; that was their business, and we looked to them to do it" (Rec. p. 316, X-Q. 188). And again, he testified that the tugs should be so placed as to be quickly available in the event of her floating (Rec. pp. 318, 319, X-Qs. 217-219).

J. Kemp, a Scott Company witness, testified that the tugs should be ready to be made use of immediately (Rec. p. 321, Q. 26); and again:

"If I was in charge of the wrecking expedition, I should have found out if there was sufficient water to go on with the ship, before I should decide on anything . . ." in the meantime, "the ship should be held in position by the pilot and tugs who have control of the ship," by means of the tugs making fast to her (Rec. pp. 321, 322, X-Qs. 37-47).

The witness Timmans, offered by the owner, testified:

" . . . I would have my tugboats around me, if I had control of it, so that when I got ready to pump my boat I could take care of her in any condition she might be in, rather than leave her on

the beach'' (Rec. p. 540, Q. 9). He also testified that he would have got her into deep water, and would ''be sure to have enough of them (tugs) to take care of her . . . the tugboats should have been right there to take care of her . . . and these three tugboats would have held her in position where she couldn't drift ashore'' (Rec. p. 457, Qs. 9-16).

In spite of this manifest duty, and in spite of the fact that the tide had been running east for over four hours, the tugs *Hazelton* and *Dalzelline* were hanging on the bow of the *Bay Port* by lines, and carried away from her by the tide. None of the tugs was prepared, or properly placed, adequately to handle the *Bay Port* when she floated. None of them attempted to hold her in deep water at or near the point where she floated. The *Hazelton* and *Dalzelline* turned around to catch her after she had floated eastward through the canal. The *Stuart* pulled the lighter *Salvor* westward. But, according to J. Kemp, the most important thing to do was for the *Stuart* to shift to the *Bay Port's* stern and get a hawser on her to steady her (Rec. pp. 329, 330, X-Qs. 132-135).

Davis, another Scott Company witness, also testified that there should have been a tug at the *Bay Port's* stern as an anchor, to hold her in position if she came off, and until the other tugs could get in position to handle her; that the *Stuart*, if she was outside the *Salvor*, was not in a proper position so to hold her when she floated, for in such position it would take her twenty minutes to get to the *Bay Port's* port quarter,

and to get a line to her (Rec. pp. 375, 376, 377, X-Qs. 68-76, Qs. 79, 80).

In that situation, with the *Bay Port* in her then condition, there being no reason why she could not be held at the point where she floated until she was put in proper condition to navigate the canal, it is submitted that beyond question the determination to start her engines full speed ahead (Hammett, Rec. p. 448, X-Q. 435) and to attempt to navigate the canal was negligent.

(c) *The master of the Bay Port does not escape responsibility for the safety of his ship, and for the determination to proceed through the canal, merely because Pilot Lewis was on board.*

In the situation which existed after the *Bay Port* floated, the responsibility was entirely that of the owner, through its captain. In the emergency which arose, the captain, being on the ship, could not escape his responsibility for the safety of his vessel, or for the determination of what measures should be taken under the circumstances. The only reply of the owner by way of evidence is the suggestion that the responsibility was that of Pilot William Lewis, inasmuch as he was present and did in fact advise the captain, or gave orders as to what should be done.

It is very well settled, however, that, although the master of a ship may be relieved to some extent, in relation to the navigation of the vessel, by the presence of a pilot, having a right to assume that the pilot has special knowledge in relation to the course to steer, the waters to be navigated, etc., yet, where there is an emergency and when the question is not one

of navigation (that is, a question as to one or more directions to follow), but one of the exercise of judgment to determine primarily whether to begin navigation or not, the presence of a pilot does not relieve the captain of the responsibility for that determination. The pilot's responsibility does not apply until navigation under his control is begun, and applies only to the "navigation." If the decision to begin navigation is a mistake, the master cannot relieve himself of responsibility by saying that the pilot suggested or assented to it.

Seaboard Transportation Co. v. Boston, Cape Cod & New York Canal Company,
270 Fed. 525; U.S. Rep. 65 L. Ed. 592.

At pages 231, 232, of Marsden's *Collisions at Sea* (6th ed. 1910), it is stated that—

"Although the pilot's authority is paramount, it has already been stated that neither the Owners nor the master are entirely free from responsibility; 'there are many cases in which there are certain duties he [the master] has to discharge, notwithstanding there is a pilot on board, for the benefit of the owners.'"

"In accordance with this principle, the following are duties of the master and crew for which the owners are held responsible, notwithstanding the presence on board of a compulsory pilot. . . . The master is responsible for the sufficiency and power of a tug employed for ordinary towage service, and for the employment of a tug where the assistance of a tug is necessary; . . . he is

generally responsible for the ordinary work of the ship being properly carried on, and for usual precautions being taken without express order from the pilot. For the trim of the ship, and generally for her sufficiency as regards tackle and equipment for ordinary purposes of navigation, the owner or master is responsible."

At pages 234, 235, it is stated that—

"In addition to the responsibility which attaches to the owners, though a compulsory pilot be on board, in respect of the proper equipment of the ship, and of certain acts of seamanship, as, for instance, in keeping a good look-out, a responsibility also rests on the master in case of an emergency, or where a reasonably prudent seaman would have taken some action, or have called the attention of the pilot to some fact. Neglect of such action by the master may place liability on the owners."

In the case of *The Oregon* (1895), 158 U.S. 186, at pages 194, 195 (cited by the Circuit Court of Appeals), which was a case of collision, it was held in part:

"Nor are we satisfied with the conduct of the master in leaving the pilot in sole charge of the vessel. While the pilot doubtless supersedes the master for the time being in the command and navigation of the ship, and his orders must be obeyed in all matters connected with her navigation, the master is not wholly absolved from his duties while the pilot is on board, and may advise

with him, and even displace him in case he is intoxicated or manifestly incompetent. He is still in command of the vessel, except so far as her navigation is concerned, and bound to see that there is a sufficient watch on deck, and that the men are attentive to their duties. *The Iona*, L. R. 1 P. C. 426.

“In *The Batavier*, 1 Spinks, 378, 383, it was said by Dr. Lushington: ‘There are many cases in which I should hold that, notwithstanding the pilot has charge, it is the duty of the master to prevent accident, and not to abandon the vessel entirely to the pilot; but that there are certain duties he has to discharge (notwithstanding there is a pilot on board) for the benefit of the owners.’ In an official report made by a maritime Commission in 1874, the Elder Brethren of Trinity House are said to have expressed the opinion ‘that in well-conducted ships the master does not regard the presence of a duly licensed pilot in compulsory pilot waters as freeing him from every obligation to attend to the safety of the vessel; but that, while the master sees that his officers and crew duly attend to the pilot’s orders, he himself is bound to keep a vigilant eye on the navigation of the vessel, and, when exceptional circumstances exist, not only to urge upon the pilot to use every precaution, but to insist upon such being taken.’ ”

(d) *Any understanding as to taking the Bay Port to Sandwich in the event of her floating was not participated in by the Canal Company, and the Canal Company is not affected thereby.*

When asked as to any orders for taking the *Bay Port* to Sandwich, which Joseph Lewis gave at the time she floated off the bank, Captain Hammett made the suggestion that it had been generally understood that after she floated she should be taken to Sandwich, and tied up there (Rec. p. 446, X-Q. 408); but, when asked as to who understood it that way, he replied: "Why, generally understood. I think that was talked over, that if she floated, I would take her down and tie her up at Sandwich" (Rec. pp. 446, 447, X-Q. 409). This clearly shows that, if any decision was reached, it was that Hammett was to take her to Sandwich. He further testified that the taking her to Sandwich was based upon the assumption that she would be previously pumped out (Rec. p. 456, X-Qs. 518-520), so that she would be in proper condition to navigate the canal. If this so-called agreement amounted to anything at all, its effect, so far as going to Sandwich was concerned, was negatived, because it was based entirely upon the assumption that the *Bay Port* would be put in a proper condition to navigate the canal.

But any such understanding that Captain Hammett might have had did not affect the Canal Company, for it was not a party to it. Even Captain Hammett, the only witness testifying to any such understanding, stated that it was talked over by Captain Joseph Lewis, Pilot Lewis, possibly Mr. Gardner of the Scott Company, and himself (Rec. p. 447, X-Q. 411). Pilot Lewis, however, denied that he took part in any such

conference (Rec. p. 517, Q. 398); but, admitting for the purpose of argument that he did, this cannot bind the Canal Company. Pilot Lewis was not its agent, and, if it was intended that he should complete Pilot Rochester's task of piloting the *Bay Port* through the canal, the agreement was, as on December 13, one of pilotage between the owner and the pilots.

Mr. Gardner, who testified, did not corroborate Captain Hammett in this particular (Rec. pp. 206-209). Captain Geer, the canal superintendent, who testified before and after Captain Hammett, did not corroborate any such statement (Rec. pp. 332-354, Qs. 522-526). He testified on direct examination that after he had turned over the tugs to Joseph Lewis on December 13, and had left the scene, he did not go near the *Bay Port* again until after she sank (Rec. pp. 339, 340, Qs. 97-111). He did not testify that any such agreement was made by or for him, and after he left there was nobody representing the Canal Company who could make such an agreement.

Undoubtedly, then, this was an afterthought of Captain Hammett to justify himself in proceeding to navigate the canal, no other justification being offered.

(e) *Captain Hammett neglected to make the Bay Port fast to dolphins about 1000 feet east of where she floated, until she could be made seaworthy.*

Captain Hammett, after discovering the condition of his vessel, passed a set of dolphins, to which the *Bay Port* could have been made fast by the tugs. The testimony as to these dolphins was in part as follows: The dolphins were about 1000 feet east of where the

Bay Port slid off the bank (B. Kemp, Rec. p. 389, X-Qs. 24, 25). This witness, B. Kemp, called by the Scott Company, testified that, if he were master of this vessel under the circumstances, he would act as indicated in the following testimony:

“X-Q. 24. Yes. A. In regards to the proceeding, I should have seen the stability of the ship, whether she was by the head, on an even keel or by the stern. If the tide had been running so fast that we thought we couldn’t steer her,—if she had been so that you could proceed in the usual way, you could proceed through the canal,—I should have dropped her down to the next dolphins, which was a matter of eight or nine hundred feet, and waited until the tide slacked up, if the tide was running so fast at that time. If I had found the ship was manageable, I should place the tug-boats and proceed through the canal.

“The Court. Were the dolphins between the place where she came off and the place where she finally was at rest?

“Mr. Pillsbury. I so understand.

“The Witness. Yes, sir; on the north bank.

“X-Q. 25. About how far down? A. I should say from the testimony I have heard, from where she struck a matter of—oh, perhaps a thousand feet, perhaps a little more” (Rec. p. 389).

The witness A. J. Davis, called by the Scott Company, stated that, if he were master, he would have trusted to the local knowledge of the pilot and to the tugs to help him out, and to put him in a more suit-

able position to get the water out so that the *Bay Port* would be in a seaworthy condition (Rec. pp. 374, 375, X-Qs. 54-59). If she had been made fast to the dolphins, she could have been pumped out at leisure, and rendered fit for navigation, and it was the duty of those in charge to tie her up at the dolphins for that purpose. Captain Hammett did not deny that this was a practical measure of safety (Rec. p. 433, Q. 192).

Upon this point the District Court found that—

“The courses open when the *Bay Port* floated were, either to hold her in the channel where she came off, by tugs, or to drop her down to some dolphins and tie her there for the time being,—both of which, it seems clear, could have been done,—or to take her on through the canal” (Rec. p. 24).

“After the *Bay Port* came off the bank she could have been held in the stream by the tugs till slack water, or she could have been tied to the dolphins” (Rec. p. 26).

“The sudden and unexpected floating of the steamer and her being caught by the current in the narrow channel created a serious emergency” (Rec. p. 24).

And also—

“... It is evident that a great mistake was made in supposing that it was safe to renew the attempt under the conditions existing when she came off the bank” (Rec. p. 26).

And again—

“The failure to tie up at the dolphins which were passed before the accident seems hard to justify on the evidence before the court. They were reached after the first crisis of the emergency had gone by, and there had been time to consider what should be done. With the help of the tugs and her own engines the Bay Port could easily have been placed at them” (Rec. p. 27).

The Circuit Court of Appeals, in reviewing this finding of fact, stated that—

“While there was evidence that Superintendent Geer gave instructions on the night of December 13th to get her through the canal as quickly as possible, this instruction did not authorize an attempt to get her through in the condition in which she was after she floated” (Rec. p. 552).

.

“We do not think any sudden emergency arose when she slid off the bank which was of such a character as to excuse her master from exercising the judgment which the law exacts from a master who has in his charge a valuable ship and cargo, and which would authorize him to surrender the command of his ship in her condition to a pilot upon whose skill in navigation only he was to depend. He was not confronted with imminent danger, although his vessel was caught by the current and began to drift with it. There were three tugs at her side with steam up and all of the witnesses, including Captain Hammett, testified that it

would have been possible for these tugs to hold her in the channel of the canal in deep water, or to place her at the dolphins which were only about 1,000 feet to the eastward, until she could be pumped out and her cargo adjusted, so that she might be in better condition to undertake the passage of the remainder of the canal" (Rec. pp. 552, 553).

And further that—

"We think that Captain Hammett was justified in assuming that Lewis was to complete the pilotage of the Bay Port through the canal, as Rochester, the pilot of the previous day, was not present; but Lewis' duties related only to pilotage through the canal. The question of determining whether the vessel was in proper condition for navigation was not for his decision, however, but for that of Captain Hammett alone; and even with the pilot in command of the navigation of the vessel, it has been held that the captain is not to leave the whole responsibility to him" (Rec. p. 553).

And again—

"The mate of the tug boat also testified that the Bay Port sheered 'practically as soon as she got afloat.' It is evident that a vessel of her type, in the condition in which she was, would steer badly; and this fact must have been known to Captain Hammett. Looking at the situation as it is presented by the evidence and not in the light of

subsequent events, we think that he was negligent in allowing his vessel to proceed before she was pumped out and her cargo adjusted. The tide was rising and in about two hours would have been high, when there would have been slack water in the canal and its navigation made safer for a vessel of the Bay Port's type" (Rec. p. 556).

This was repeated by the Circuit Court of Appeals in its second opinion (Rec. p. 573).

While the District Court held that White Oak Transportation Company was not responsible for the determination to navigate on the second day, yet, in view of the fact that the District Court found that the taking of the vessel through the canal was a "great mistake," and the failure to tie up at the dolphins "hard to justify," which is not inconsistent with the finding of the Circuit Court of Appeals, viz., that such course of action was negligent, and there being ample evidence to justify this finding of fact by the Circuit Court of Appeals, it ought not to be disturbed. The Circuit Court of Appeals therefore did not err as set forth in petitioner's sixth assignment of error.

L

The Circuit Court of Appeals was right in not ruling as a matter of law that Captain Hammett's decision to proceed was an error in extremis.

As appears from the evidence hereinbefore quoted, practically all the witnesses agreed that the *Bay Port* when she floated could have been held at that spot by the tugs or tied to dolphins until the water was pumped out. Captain Hammett, from his long ex-

perience as a navigator, must have known this, and from his testimony did know it, long before the *Bay Port* came afloat (Rec. p. 449, X-Qs. 445-446).

Captain Hammett must also have known in advance that, if the *Bay Port* should come afloat before she was entirely pumped out and her cargo retrimmed, she would not be in a fit condition to navigate the canal, and, upon Captain Hammett's own testimony, she was not in such a fit condition (Rec. pp. 432, Q. 169; p. 449, X-Q. 450; pp. 450, 451, X-Qs. 457, 458, 464-474).

Allowing twelve and a half hours for an ebb and flow of the tide, which is more than enough, when the *Bay Port* struck, December 13, 1916, the tide had been ebbing since 11.50 a.m., or for two hours and twenty-five minutes, leaving three hours and fifty minutes of tide, so to speak. When she floated, on December 14, 1916, the tide had been flowing since 6 a.m., or for four hours and fifteen minutes, creating that amount of tide. Therefore, if she struck on three hours and fifty minutes of tide, Captain Hammett should at least have anticipated her coming afloat at a similar stage of the tide, which, on December 14, would have been 9.50 a.m., or twenty-five minutes before she actually did float.

The witness Lecompte testified that about 9.30 to 10 a.m., or about one half hour before the *Bay Port* floated, he mentioned to Joseph Lewis that it was a pretty strong tide to go through with the *Bay Port*, and that Joseph Lewis replied: "We have got three powerful tugboats . . . we will hold her" (Rec. pp. 194, 195, Qs. 83-86). This is corroborated by the witness Donnelly (Rec. p. 217, Qs. 38-41), and is not controverted by White Oak Transportation Company.

Joseph Lewis and Captain Hammett, therefore, were warned of the dangers, and appreciated the only method of overcoming them, and yet failed to adopt such measures.

Captain Hammett, in direct examination, in reply to a question as to whether he would have pursued the same course even if he had known of the existence of any shoal further east showing from 19 to 20 feet of water, testified that it would not have affected his course of action, even if he had known about it (Rec. p. 433, Qs. 188-191).

Clearly, then, Captain Hammett, as master of the vessel, had plenty of opportunity before the *Bay Port* came afloat to determine his course of action. Even after she came afloat, he had ample time to observe the condition of the *Bay Port* and to decide not to navigate the canal. His testimony bearing upon his opportunity to discover the *Bay Port's* condition after she floated was in part as follows:

"Q. 169. And how was she as to being by the head when she came off? A. Well, I presume she might have been 18 inches; I am not positive of that, of course; I can't tell only judging by my eye" (Rec. p. 432).

While Captain Hammett said that there was no difficulty in steering, and that the *Bay Port* went "first rate," Pilot Lewis testified upon this point in part as follows:

"Q. 85. Was the *Bay Port*, from the time she went off the bank as you have described up to the time she struck, under control? A. No, sir.

"Q. 86. Will you describe a little more in detail what her conduct was from the time she went off until she struck in the way you have indicated?
A. Why, she was continually sheering and drifting from one side to the other; she had no headway to amount to anything excepting the drift of the tide" (Rec. p. 165).

The witnesses Lecompte, Donnelly, and Wagner also testified that from the time she floated until she stranded she was sheering practically all the time (Lecompte, Rec. p. 192, Qs. 48-50; Donnelly, Rec. p. 217, Q. 45; Wagner, Rec. p. 228, Q. 38).

Apart from the question of how the *Bay Port* acted, it is clear that Captain Hammett had time to observe, and did observe, that the *Bay Port* was down by the head 18 inches, and was more logy than she was the day before, and yet, in spite of these observations, he determined to go on, and would have made the same determination even if he had known that there was only 18 to 20 feet of water in the canal (Hammett, Rec. p. 433, Qs. 188-190).

Captain Hammett, knowing the conditions of his vessel, also neglected to tie her up to the dolphins, as he might have done, which would have given an opportunity to pump her out and retrim her cargo.

Captain Hammett testified upon this point as follows:

"Q. 192. . . . In your judgment, was it safe or practical to have attempted to tie up in the canal at those dolphins that you passed by at that time?
A. Whether it would have been practical, I wouldn't say" (Rec. p. 433).

The District Court found as a matter of fact, to which no error was assigned in the petitioner's appeal to the Circuit Court of Appeals, that—

“The courses open when the Bay Port floated were, either to hold her in the channel where she came off, by tugs, or to drop her down to some dolphins and tie her there for the time being,—both of which, it seems clear, could have been done,—or to take her on through the canal” (Rec. p. 24).

And again—

“The failure to tie up at the dolphins which were passed before the accident seems hard to justify on the evidence before the Court. They were reached after the first crisis of the emergency had gone by, and there had been time to consider what should be done. With the help of the tugs and her own engines the Bay Port could easily have been placed at them” (Rec. p. 27).

As the District Court said in its finding, the stress of any emergency had passed, and the District Court did not find any “*error in extremis*” upon the part of Captain Hammett. The master, in command of his ship, and bound to take all reasonable precautions to preserve her, must have observed the sheering and known of the unseaworthiness and unmanageability of the vessel by the time the dolphins were reached, for upon all the evidence she was constantly sheering from side to side. The fact that a pilot was on board or that any understanding might previously have been reached to take her to Sandwich does not

justify this failure. It was his obligation to supersede the pilot, to stop navigation, and to tie his vessel up, if necessary, for her safety.

The Circuit Court of Appeals in discussing this point reversed the finding of the District Court, and found as a matter of fact that—

“We do not think any sudden emergency arose when she slid off the bank which was of such a character as to excuse her master from exercising the judgment which the law exacts from a master who has in his charge a valuable ship and cargo, and which would authorize him to surrender the command of his ship in her condition to a pilot upon whose skill in navigation only he was to depend. He was not confronted with imminent danger, although his vessel was caught by the current and began to drift with it. There were three tugs at her side with steam up and all of the witnesses, including Captain Hammett, testified that it would have been possible for these tugs to hold her in the channel of the canal in deep water, or to place her at the dolphins which were only about 1,000 feet to the eastward, until she could be in better condition to undertake the passage of the remainder of the canal” (Rec. p. 552).

“It is evident that a vessel of her type, in the condition in which she was, would steer badly; and this fact must have been known to Captain Hammett. Looking at the situation as it is presented by the evidence and not in the light of subsequent events, we think that he was negligent in allowing his vessel to proceed before she was

pumped out and her cargo adjusted. The tide was rising and in about two hours would have been high, when there would have been slack water in the canal and its navigation made safer for a vessel of the Bay Port's type" (Rec. p. 556).

It was said in the case of *The Germanic* (1905), 196 U.S. 589, that—

"It is quite true that negligence must be determined upon the facts as they appeared at the time and not by a judgment from actual consequences which then were not to be apprehended by a prudent and competent man . . . But it is a mistake to say . . . that if the man on the spot, even an expert, does what his judgment approves, he cannot be found negligent."

The District Court having found that Captain Hammett's navigation of the canal, and passing of the dolphins, was "hard to justify," and the Circuit Court of Appeals having found that the same was negligent, the findings are not inconsistent, but both Courts concurred in the finding that such determination of Captain Hammett was not an error *in extremis*.

The Circuit Court of Appeals did not err, therefore, as set forth in White Oak Transportation Company's seventh assignment of error, and the finding of the Circuit Court of Appeals ought not to be disturbed.

M.

Conclusion.

The respondent respectfully submits, therefore, that the decree of the Circuit Court of Appeals should be affirmed with costs.

GUY W. CURRIER,
THOMAS H. MAHONY,
Proctors for Respondent,
BOSTON, CAPE COD & NEW YORK
CANAL COMPANY.

Statement of the Case.

WHITE OAK TRANSPORTATION COMPANY v.
BOSTON, CAPE COD & NEW YORK CANAL
COMPANY.

NORTHERN COAL COMPANY v. BOSTON, CAPE
COD & NEW YORK CANAL COMPANY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE
FIRST CIRCUIT.

Nos. 116, 124. Argued March 1, 1922.—Decided April 10, 1922.

Where a large steamship, heavily laden and awkward to steer, traversing a canal, sheered to one bank and then the other, grounded, sprang a leak, and despite efforts first to hold and lighten and then to tow her through, sheered again to the other bank and sank, becoming a total loss with her cargo, *held*, upon the findings and evidence—

- (1) That the master was not to blame for not displacing a canal pilot after the first accident and for permitting the vessel to proceed, before slack water, not fully pumped out and with her cargo unadjusted, in view of the canal company's regulations, the directions of its superintendent and the situation and consensus of opinion existing at the time. P. 344.
- (2) That the loss was attributable to the joint negligence of the canal company and the master in attempting to pass such a vessel through the canal. P. 345.
- (3) That all the damages, arising from the loss of the vessel and its cargo, injury to the canal and obstruction of the canal business, should be divided equally between the canal company and the vessel owner. P. 345.
- (4) The cargo owner, having proceeded only against the canal company, was entitled to a decree for the full amount of its loss against that company. P. 345.

265 Fed. 538; 267 Fed. 176, reversed.

CERTIORARI to decrees of the Circuit Court of Appeals, the one holding the petitioner Transportation Company liable to the respondent Canal Company for damages found to have resulted from negligence of the petitioner in the management of its vessel in the respondent's canal;

the other exonerating the respondent Canal Company from liability to the petitioner Coal Company for the loss of a cargo contained in the same vessel.

Mr. Edward E. Blodgett, with whom *Mr. Foye M. Murphy* was on the brief, for petitioner in No. 116.

Mr. Henry E. Warner, with whom *Mr. John G. Palfrey* was on the brief, for petitioner in No. 124.

Mr. Thomas H. Mahony, with whom *Mr. Guy W. Currier* was on the brief, for respondent.

Mr. Samuel Park, with whom *Mr. Henry E. Mattison* was on the brief, for the T. A. Scott Company, Inc., impleaded with respondent.

MR. JUSTICE HOLMES delivered the opinion of the court.

On December 13, 1916, the steamer Bay Port, while passing through the Cape Cod Canal, ran ashore on the south bank and the next day sank diagonally across it. In January, 1917, the Canal Company filed a libel against the White Oak Transportation Company, the owner of the steamer, to recover for damages suffered by the canal and the obstruction of traffic through it. It also filed a libel against the T. A. Scott Company, Inc., a wrecking company, for negligence in dealing with the steamer after it had grounded; but this company has been exonerated and is not before us. In May, 1917, the Transportation Company filed a libel against the Canal Company, to charge it with a total loss of the steamer and freight, and in March, 1918, the Northern Coal Company intervened seeking to hold the Canal Company for a total loss of the cargo, which was coal. The causes were heard together below and were consolidated by agreement for hearing and determination upon one record here. The District Court found no negligence on either side and dismissed all the

libels. 251 Fed. 356. The Circuit Court of Appeals held the Transportation Company liable to the Canal Company, and reversed the decree in that cause. 265 Fed. 538. It also dismissed the intervening petition of the owner of the coal. 267 Fed. 176.

We agree with the Circuit Court of Appeals that the owners of the Bay Port and the Canal Company both ought to have known that it was unsafe to take the vessel through the canal. We agree with the dissenting Judge in the Circuit Court of Appeals that the loss of the cargo must be attributed to the joint negligence of the two; and we are of opinion that the amount of that loss, that suffered by the vessel and that suffered by the canal should be added together and divided between the Bay Port and the Canal.

The Bay Port was a lake built steamer of the whaleback type, 265 feet long and of 38 feet beam, which had been brought to the Atlantic. When deeply laden she steered somewhat awkwardly but as well as other vessels of the type. She was loaded with 2393 tons of coal and had a draft of eighteen feet two inches aft and seventeen feet eight inches forward, when soon after noon on December 13, 1916, she appeared at the western or Wing's Neck entrance to the canal. Her captain was a man of experience and had gone through the canal twice with the Bay Port when empty, never when loaded. He had been solicited by the Canal Company to go by way of the canal, the Company representing the canal to be twenty-five feet deep throughout as its charter required. Mass. Act of 1899, c. 448, § 3.

Having got permission the Bay Port started in tow of a tug with a competent pilot. The tide was about half out, running west at about three knots an hour. After proceeding halfway through the canal the vessel passed over a shoal where there was not more than twenty-one or

twenty-two feet of water, and soon after sheered toward the north bank and then toward the south bank where she grounded, at about a thousand feet from the shoal. It is strongly argued that this and the shoal next to be mentioned caused the trouble, but, notwithstanding *The Pennsylvania*, 19 Wall. 125, we will accept the finding of the two Courts that they were not the proximate cause. Two tugs and the superintendent of the canal came to the help of the Bay Port but could not get her off as the tide was falling. The tugs kept her upon the bank and the next morning a hole was discovered in her bottom, but was plugged. Arrangements had been made to lighten the cargo when unexpectedly, about 10.15 a. m., she slid into the channel. The pilot with whom she started had left but another canal pilot who seems to have taken his place ran upon the bridge and directed the captain to start his engines at full speed to prevent her drifting upon the opposite bank. She was down at the head from 18 to 30 inches with a list to port of from 15 to 24 inches. Since 6 a. m. the tide had been running to the east, the direction in which the steamer was going, and the pilot ordered a tug to take her in tow and started toward the east. The Bay Port proceeded about a mile; but after she had passed another shoal spot by some two thousand feet, sheered again two or three times and stranded on the north bank, the bow came clear and swung down stream and then she sank and became a total loss.

The Circuit Court of Appeals thought that the master was responsible for the loss because he did not displace the pilot and prevent the vessel proceeding before she was fully pumped out, the cargo adjusted and slack water had come, which he might have done by holding her in the channel by the tugs that were present or by tying up to some dolphins that he passed. Upon this point we agree with the reasoning of the District Court. The emergency was serious. The canal regulations provided

that in the event of grounding the canal authorities should have the right to direct all operations for floating the vessel. The superintendent of the Canal while present had told the pilot that he wanted to get the vessel out of the canal as soon as possible. The captain regarded that as the understanding of all concerned. The wreckers called out to the pilot: "She is yours." The pilot assumed command and started to carry out the superintendent's wish. Everybody at the time thought that the proper course, and we cannot think that the master was to blame for not overriding the judgment of the local experts, with which his own concurred, on general grounds. On the other hand, as we have said, we agree with the Circuit Court of Appeals, and in any event we find that the evidence recited by it shows that the Company had notice and that the master of the vessel ought to have known that it was unsafe and improper to try to carry this vessel, loaded as it was, through the canal. Both parties, therefore, are responsible for all the damages including the loss of cargo and they should be divided between the two. The cargo owner, however, having proceeded only against the Canal Company, is entitled to a decree against that company for the full amount. *The Atlas*, 93 U. S. 302. *The New York*, 175 U. S. 187, 209, 210.

Decree of Circuit Court of Appeals reversed.

Decree to be entered that the Northern Coal Company recover its damages and costs from the Boston, Cape Cod & New York Canal Company; that the White Oak Transportation Company exonerate the Boston, Cape Cod & New York Canal Company from one-half of the above damages and costs, and that the damages and costs of the White Oak Transportation Company and the Boston, Cape Cod & New York Canal Company be equally divided between those two companies.